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No. 99-

IN THE

Supreme Court of the United States

RONALD H. BLACKLEY, Sr.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the District of Columbia Circuit's and the United States District Court for the District of Columbia's expansive view of Independent Counsel Smaltz's jurisdiction and his authority to ignore Department of Justice policy violates the requirements of the Ethics in Government Act, this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), and separation of powers principles.

2. Whether the United States District Court for the District of Columbia's failure to instruct the jury that it must find that Mr. Blackley's failure to report checks on his 1993 financial disclosure form violated a legal duty to find him guilty of concealment under 18 U.S.C. § 1001 violates this Court's decisions in *United States v. Gaudin*, 515 U.S. 506 (1995), and *Richardson v. United States*, No. 97-8629, 1999 U.S. Lexis 3640 (1999).

3. Whether the sentencing court's eight level upward departure increasing Mr. Blackley's sentence for false statement offenses under the fraud guidelines from possible probation to 27-months imprisonment based upon Mr. Blackley's status as a public official violates the requirements of federal sentencing guidelines, the Sentencing Reform Act of 1984, and this Court's decision in *United States v. Koon*, 518 U.S. 81 (1996).

4. Whether the sentencing court's eight level upward departure increasing Mr. Blackley's sentence for false statement offenses under the fraud guidelines from possible probation to 27-months imprisonment when there was no monetary loss and no charge or proof of an illegal gratuity is unreasonable under *Williams v. United States*, 503 U.S. 193 (1992), and *United States v. Sun-Diamond*, 119 S. Ct. 1402 (1999).

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PETITION FOR A WRIT OF CERTIORARI

Ronald H. Blackley, Sr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming his conviction in the United States District Court for the District of Columbia of three counts of violating 18 U.S.C. § 1001 and his sentence of 27-months incarceration.

Mr. Blackley was chief of staff for former Secretary of Agriculture, Alphonso Michael Espy. He was prosecuted by the Espy Independent Counsel ("IC"), Donald Smaltz, for three counts of false statements relating to omissions of approximately $22,000 on his 1993 SF 278 Financial Disclosure Form and to statements about these omissions to agents for Department of Agriculture and Agency for International Development inspectors general.

IC Smaltz's jurisdictional mandate was narrowly confined to investigating whether Secretary Espy committed violations of law "relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture."

Congress specifically provided in the Ethics in Government Act ("the Act") that omission violations by public officials are to be dealt with administratively and civilly. The Department of Justice also has a written policy against prosecuting financial disclosure violations under 18 U.S.C. § 1001. IC Smaltz acknowledged that he pursued his investigation after the Justice Department declined to take any action against Mr. Blackley, and that he did so in an attempt to secure Mr. Blackley's cooperation against Secretary Espy.

The items alleged to have been omitted from Mr. Blackley's 1993 Financial Disclosure Form had no relationship to gifts to Espy. Nor did IC Smaltz ever charge Mr. Blackley with improperly receiving gifts. Prior to trial,

Mr. Blackley moved to dismiss the indictment on the grounds that the filed charges violated the Act and this Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), since they fell outside of IC Smaltz's jurisdictional mandate and were inconsistent with Department of Justice policy.

The District Court denied Mr. Blackley's motion and ruled, in effect, that there were virtually no limits on IC Smaltz's jurisdiction, and that IC Smaltz could treat Mr. Blackley differently than he had been, or would be, treated by the Justice Department.

During the trial, IC Smaltz introduced no evidence on what had to be or what was exempt from reporting requirements on Mr. Blackley's 1993 SF 278 Financial Disclosure Form. IC Smaltz did no more than introduce evidence that Mr. Blackley had received 11 checks in amounts ranging from $200 to $10,000 during 1993, and had not reported them on his 1993 form. It was also not until cross-examination that IC witnesses disclosed that Mr. Blackley had reported anticipated earnings of $27,550 on his initial 1992 Financial Disclosure Form for income "earned" but not yet "received" prior to his beginning work as Espy's chief of staff in January 1993.

At the conclusion of the trial, the District Court refused to instruct the jury as requested by Mr. Blackley that it could only find him guilty of omissions on his financial disclosure form if he had a legal duty to report the omitted items. Mr. Blackley was subsequently convicted by the jury on the three false statements counts.

The District Court inflicted further injustice on Mr. Blackley by sentencing him to 27-months imprisonment even though he was eligible for probation under the fraud guidelines. The District Court upwardly departed by *eight levels*, increasing Mr. Blackley's offense level of eight to 16,

because the District Court concluded that the Sentencing Commission did not take public official status into account when it drafted the fraud guidelines.

The affirmance by the Circuit of Mr. Blackley's conviction and sentence presents questions of fundamental importance. This Court, in *Morrison*, 487 U.S. 654, upheld the constitutionality of the Act only after concluding that the Act imposed significant constraints on the scope of an independent counsel's jurisdiction and required that public officials investigated under the Act not be singled out for disparate treatment. In fact, Mr. Blackley was singled out for disparate treatment in this case, not once, but twice. And this all began, in the words of Justice Scalia in his dissenting opinion in *Morrison*, because "[t]he mini-Executive that is the independent counsel . . . is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide." 487 U.S. at 732. Review is important not only to Mr. Blackley but to others who will not benefit from the sun-setting of the independent counsel statute in June 1999 because of actions already taken or to be taken against them by existing independent counsel.

Further, in light of this Court's decisions in *United States v. Gaudin*, 515 U.S. 506 (1995), and *Richardson v. United States*, No. 97-8629, 1999 U.S. Lexis 3640 (1999), this case raises important questions about the effect of the District Court's refusal to instruct the jury that there must be a legal duty to disclose omitted information in a false statements prosecution.

In affirming the conviction and sentence, the Circuit's opinion also raises significant questions about a sentencing court's authority to upwardly depart solely because of a person's status as a public official within the strictures of the

Sentencing Reform Act of 1994, the federal sentencing guidelines, and this Court's decision in *United States v. Koon*, 518 U.S. 81 (1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 167 F.3d 543 (D.C. Cir. 1999), and reprinted as Appendix A, *infra*, 1a-20a. The District Court's decision denying Mr. Blackley's pretrial motions to dismiss the unlawful prosecution of him is reported at 986 F. Supp. 607 (D.D.C. 1997), and is included as Appendix B, *infra*, 21a-40a. The United States District Court for the District of Columbia's judgment against Ronald H. Blackley, Sr., is reprinted as Appendix C, *infra*, 41a-48a. The March 31, 1999 order of the District of Columbia Circuit denying Mr. Blackley's timely petition for rehearing and suggestion for rehearing *en banc* is included as Appendix D, *infra*, 49a. The District Court's adoption of IC Smaltz's instructions and these jury instructions are reprinted as Appendix H, *infra*, 148a-164a. The District Court's sentence of Mr. Blackley is reprinted as Appendix I, *infra*, 165a-196a.

JURISDICTION

This Court's jurisdiction to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The District of Columbia Circuit issued its decision on January 26, 1999, and denied Mr. Blackley's timely petition for rehearing and suggestion for rehearing *en banc* on March 31, 1999. This petition has been filed within ninety days of the Circuit's denial of rehearing as required by Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

Title VI of the Ethics in Government Act of 1978, as amended, 28 U.S.C. §§ 591-599 is set forth as Appendix E, *infra*, 50a-109a. The Code of Federal Regulations, Title 5, Sections 2634.104, 2634.105, 2634.202, 2634.302, 2634.304, 2634.305, 2634.306, 2634.308, and 2634.309, is set forth as Appendix F, *infra*, 110a-134a. The United States Sentencing Guideline, § 2F1.1, is set forth as Appendix G, *infra* 135a-147a. Finally, relevant provisions of the Sentencing Reform Act of 1984, as included in the Sentencing Guidelines Manual (1997) is set forth as Appendix J, *infra*, 197a-219a.

STATEMENT OF THE CASE

Mr. Blackley, who was the chief of staff to Alphonso Michael Espy, former Secretary of Agriculture, for 13 months, was prosecuted by IC Smaltz under the independent counsel statute, the Ethics in Government Act ("the Act"), 28 U.S.C. §§ 591-599, relating to omissions from his 1993 SF 278 Financial Disclosure Form and to statements about those omissions to inspectors general of the Department of Agriculture ("USDA") and the Agency for International Development ("AID").

IC Smaltz's original mandate issued by the Special Division on September 9, 1994, was narrowly confined to investigating whether former Secretary Espy committed violations of law "relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture." The mandate also granted IC Smaltz authority to investigate and prosecute "other allegations or evidence of violations of any federal criminal law . . . by any organization or individual developed during the Independent Counsel's investigation [regarding Mr. Espy] and connected with or arising out of that investigation"

and offenses relating to the obstruction of the IC's investigation. The full extent of the language in the original mandate is found in the District of Columbia Circuit's opinion at appendix 7a-8a.[1]

The indictment returned on April 22, 1997, charged Mr. Blackley with three counts of making false statements relating to checks totaling approximately $22,000 received in 1993 from two friends and former business colleagues, Messrs. Fuller and Cochran. Count one of the indictment alleges that on June 28, 1994, Mr. Blackley knowingly and willfully failed to disclose to the USDA, the receipt of 11 checks ranging from $200 to $10,000, on his 1993 SF 278 Financial Disclosure Form.

Count two charged that Mr. Blackley provided false information to an agent of the USDA Inspector General about the source of his earnings in 1993 in a seven sentence portion of a several page sworn declaration. Count three charged that Mr. Blackley falsely told an AID Inspector General agent that he received no "remuneration" other than his government salary in 1993.

Prior to trial, Mr. Blackley moved to dismiss the indictment and argued that IC Smaltz exceeded his jurisdiction in obtaining the indictment against him because (1) the

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[1] IC Smaltz subsequently sought approval for a referral to investigate and prosecute Mr. Blackley. IC Smaltz's Application involved a completely different set of facts and a different crime than that charged. This additional referral, approved by the Special Division over the objection of the Attorney General, was narrowly defined and restricted to any violation of law related to an improper intervention by Secretary Espy or Mr. Blackley in the subsidy application, appeal or review process. The District of Columbia Circuit found that this referral did not provide the basis for the prosecution in this case and that the Indictment related to the September 1994 original mandate. Appendix 5a-6a.

charges were not "related to" the original mandate, and (2) the Act, 28 U.S.C. § 594(f)(1), requires the Office of Independent Counsel ("OIC") to adhere to Department of Justice ("DOJ") policy, which provides that criminal false statements charges should not be brought for SF 278 Financial Disclosure Form violations unless there is significant underlying wrongdoing.

District Judge Royce Lamberth denied Mr. Blackley's motion. *United States v. Blackley*, 986 F. Supp. 607 (D.D.C. 1997), Appendix B. The District Court held that it could "discern a reasonable, causal or logical connection" between the jurisdiction conferred on IC Smaltz and the charges filed because the indictment alleged that Mr. Blackley had received unreported checks from two persons who had business pending before the USDA within his purview. Appendix B, 31a. The District Court also held that it was inconsistent with the purposes of the Act to require an independent counsel to comply with DOJ policies that would prevent him from ensuring that public officials maintain the highest standard of ethical conduct. Appendix B, 31a-38a.

At trial, the government introduced evidence that Mr. Blackley or his wife received 11 checks during 1993 that were not reported on his 1993 Financial Disclosure Form. Ten of the 11 checks, totaling $21,025 of the $22,025 at issue, were written by Charles Fuller, the person to whom Mr. Blackley turned over his rice brokerage business in 1992, prior to leaving Mississippi to become Espy's chief of staff.

Government witnesses conceded that Mr. Blackley had reported possible estimated earnings from his rice brokerage business of approximately $27,550 on his initial 1992 Financial Disclosure form, filed in 1993 for the time period beginning six months prior to entering federal service and continuing to March 1993. Nov. 21, 1997 Tr. at 141. *See*

Deft's Exh. 5, 7. They further conceded that the financial disclosure form is complicated and that there may be confusion over whether income must be reported in the year in which is earned, when it is received, or both. Nov. 20, 1997 Tr. at 109, 124.

Mr. Fuller received subsidies from the USDA in 1993, but these had been fixed prior to the time Mr. Blackley began work at the USDA, and Mr. Fuller had no appeal or any other business pending at the USDA in 1993.

The only other check at issue was a $1,000 check written by Carolyn Cochran to Mr. Blackley's son, Ron Blackley, Jr., when he was a graduating high school senior. Before going to Washington in 1993, Mr. Blackley represented the Cochrans in an appeal of a preliminary decision to reduce the amount of the subsidy they had received for a number of years. The USDA had tentatively decided to reinstate the previous subsidy amount before Mr. Blackley joined the USDA in January 1993. On his first day of employment, Mr. Blackley met with J. Michael Kelly, USDA's ethics officer, and agreed in writing not to participate any further in the Cochrans' appeals process. The Cochrans' position was ultimately sustained by the USDA, and IC witnesses testified that the appeal was decided on the merits and without any improper intervention by Mr. Blackley. Nov. 21, 1997 Tr. at 48-49.

The government did not introduce any evidence at trial explaining why Mr. Blackley had to report any of the checks on his 1993 Financial Disclosure Form. The Act and related regulations provide a number of exceptions to reporting requirements, including loans of $10,000 or less, most gifts to dependents, and gifts of less than $250. 5 C.F.R. §§ 2634.304, 2634.305, 2634.309. The 11 checks received by Mr. Blackley in 1993 ranged from $200 to $10,000.

In summary, there was no evidence presented at trial that the approximately $22,000 in unreported checks had been received either from a person "with business pending with the USDA" or "whose business was under his [Mr. Blackley's] purview" or that these various checks were required to be reported under the provisions of the Act. Appendix I, 173a.

Following the trial, the District Court rejected Mr. Blackley's proposed instructions that a legal duty to disclose is a required element under the concealment clause under 18 U.S.C. § 1001.

The jury convicted Mr. Blackley of all three false statements counts. In his presentence report, the federal probation officer concluded that Mr. Blackley was eligible to a sentence of probation because there was no monetary loss to the government and his offense level was an eight under the fraud guideline, U.S.S.G. § 2F1.1 (a base offense level of six and two additional points for more than minimal planning).

The District Court adopted the probation officer's findings at the presentence hearing on March 13, 1998. The District Court then indicated, however, that it intended to upwardly depart eight levels because the fraud guidelines did not give adequate consideration to false statements by high level government officials, that payments were made by persons with matters pending before the USDA that fell within Mr. Blackley's purview, and that Mr. Blackley knew that it was improper for him to receive these monies. Appendix I, 184a. Mr. Blackley notified the District Court of his opposition to the eight level upward departure both at the presentence hearing and at the time of sentencing. The District Court did not change its findings from the presentence hearing, and on March 18, 1998, sentenced Mr. Blackley to imprisonment of 27 months, the highest possible sentence in the level 16 sentencing range, and three years of supervised

release. Appendix I, 196a. The Circuit Court affirmed the District Court's sentence and found that the eight level upward departure was within the District Court's broad discretion.

REASONS FOR GRANTING THE WRIT

I. The Office of Independent Counsel's Exercise of Jurisdiction to Prosecute Mr. Blackley For False Statements Charges Is Inconsistent with This Court's Opinion in Morrison v. Olson, 487 U.S. 654 (1988), and Violates the Requirements of the Ethics in Government Act and Separation of Powers Principles.

The prosecution of Mr. Blackley is extraordinary. The Circuit's opinion affirming the OIC's actions in this matter essentially ignores the strict limitations imposed on independent counsel jurisdiction by the Act and in this Court's decision in *Morrison*, 487 U.S. 654.

The Act has survived challenge because, consistent with congressional intent, it carefully restricts the extent to which independent counsel can evade the exclusive prerogatives of the Executive Branch to investigate and prosecute federal crimes. As this Court declared in *Morrison*, "[The Act gives] the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696.

Both prior to the enactment of the original Act in 1978, and in the deliberations over various amendments to it since, Congress has consistently reiterated the need to impose constraints upon the investigative and prosecutorial authority and jurisdiction of independent counsel. While independent counsel are authorized under the Act to pursue investigations and prosecutions "demonstrably related to" their mandate, any

assessment of prosecutorial jurisdiction must be undertaken with separation of powers limitations in mind.

The prosecution and indictment of Mr. Blackley by IC Smaltz and the Circuit's opinion condoning the OIC's prosecution and indictment violates both the Act and the principles enunciated in *Morrison* because: 1) the charges against Mr. Blackley are unrelated to the OIC's original mandate; and 2) the prosecution of Mr. Blackley is directly inconsistent with DOJ policy and the requirements of 28 U.S.C. § 594(f).

A. The indictment against Mr. Blackley fails to relate to the original mandate.

The Special Division's original mandate to IC Smaltz on September 9, 1994, was faithful to the principle of restricted delegation of federal prosecutorial power to an independent counsel. Investigation and prosecution were limited to violations by Secretary Espy of any federal criminal law "relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture."

The false statements charges relating to Mr. Blackley's failure to disclose certain amounts on his 1993 SF 278 Form are not related to improper gifts accepted by Secretary Espy, and therefore, are not related to the original mandate.

The District of Columbia Circuit's opinion tears the restricted notion of "relatedness" away from its separation of powers moorings in concluding that the charges against Mr. Blackley were "related to" the original mandate concerning Espy. The opinion first attaches significance to the fact that Mr. Blackley was Espy's chief of staff. The Circuit Court discusses the meaning of the word "relation" in the context of the relationship between Espy and Mr. Blackley, as opposed

to the crime that is the subject of the mandate. In fact, the opinion states that an independent counsel should be able "to pursue crimes by the original target's close associates in the field of activity under investigation, . . ." presumably without consideration as to whether the actual charge itself is related to the charge being investigated in the original mandate. Appendix A, 9a.

The opinion goes even further by stating that "just as a person is 'related' not only to his parents and children, but to grandchildren and grandparents, the fact that a crime is in some sense a verbal step or two away from the core crime cannot alone render it *un*related." Appendix A, 9a. The Circuit Court's expansive view of "relatedness" underscores why the Attorney General opposed IC Smaltz's request to the Special Division for an additional referral:

> [T]here would be no logical or principled limits on the jurisdiction of an independent counsel. He is simply granted a roving license to prosecute any individual whose path may have crossed that of the covered person—and all individuals in turn connected to that individual—in hope that if criminal charges can be brought, these individuals may have some relevant information that they can be persuaded to offer. A wide range of persons would thus be swept within the potential scope of an independent counsel's prosecutorial jurisdiction simply because they are friends, neighbors, family members or business acquaintances of the subject of the independent counsel's investigation.

Opp. of the United States to Application for Referral of Related Matters, filed February 20, 1996.

The Circuit Court also concluded that the false statements charges against Mr. Blackley are "related to" the original

mandate because (1) the money received by Mr. Blackley in 1993 that he failed to report on his SF 278 Form came from individuals who received subsidies, and (2) the DOJ "allows its attorneys to use prosecutions under § 1001 as a vehicle for pursuing public corruption crimes." Appendix A, 10a. Neither of these reasons explains how the charges against Mr. Blackley are "related to" the original mandate to investigate Espy's alleged receipt of gratuities. Mr. Blackley was not charged with receiving a gratuity and the fact that the individuals who wrote Mr. Blackley checks received subsidies from the USDA in 1993 has absolutely nothing to do with the charge that Espy received gratuities.[2]

For these reasons, the Circuit Court's reasoning that the indictment against Mr. Blackley was somehow related to the original mandate to investigate Espy is flawed. This Court defined "related to" in 28 U.S.C. § 594(e) of the Act by stating that the referral jurisdiction "must be demonstrably related to the factual circumstances that give rise to the Attorney General's investigation and request for the appointment of the Independent Counsel in the particular case." *Morrison*, 487 U.S. at 679.

In testimony before the House Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary on March 2, 1999, Deputy Attorney General Eric Holder opposed re-authorization of the independent counsel statute because of what he viewed as "an unduly expansive interpretation of what is a related matter, with the result that an Independent Counsel can be given jurisdiction to investigate the associates of a covered person for alleged crimes that have the most tangential relationship to the alleged crimes by the covered person." Statement of Deputy Attorney

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[2] Nor was Mr. Blackley charged with obstruction of justice, perjury, or any other crime arising out of the Espy investigation.

General Eric Holder at the Hearing of the House Subcommittee on Commercial and Administrative Law Considering Reauthorization of the Independent Counsel Law, March 2, 1999. Deputy Attorney General Holder cited this case as the illustration supporting the DOJ's concern that congressional intent is being ignored. *Id.*

This concern about the undue expansion of independent counsel jurisdiction was shared by a number of other witnesses at the reauthorization hearings, including another independent counsel, Kenneth Starr. Starr told the Committee that "[t]he statute seeks to shift responsibility for the rare investigation that raises a conflict, not for federal law enforcement in general. The strict limits on the Independent Counsel, moreover, were central to the Supreme Court's constitutional holding in *Morrison*. An Independent Counsel's investigation may be 'fuzzy at the borders,' as the D.C. Circuit said a few years ago, but there are borders. Constitutionally, there have to be." Statement of Kenneth Starr before the Senate Committee on Governmental Affairs Hearing on the Future of the Independent Counsel Act, April 14, 1999.

B. The OIC violated 28 U.S.C. § 594(f) by failing to follow DOJ policy.

IC Smaltz's decision to present this matter to the grand jury violated established DOJ policy against prosecuting alleged violations of financial disclosure requirements under 18 U.S.C. § 1001 "unless a nondisclosure conceals significant underlying wrongdoing." Campbell, John C. (Trial Attorney, Public Integrity Section, Criminal Division), "False Statements" Annotation, Vol. 9A Department of Justice Manual at 9-1938-123 (Supp. 1988). Under 28 U.S.C. § 594(f)(1) of the Act:

> An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies . . . the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

By IC Smaltz's own admission after trial, he undertook to investigate and prosecute Mr. Blackley even though the DOJ had previously declined prosecution of the matter. Interview with IC Smaltz by WGBH Frontline, a PBS Program (televised May 19, 1998). And he did so in an attempt to secure Mr. Blackley's cooperation against Secretary Espy.

This Court in *Morrison* upheld the constitutionality of the Act against separation of powers challenges, in part, because of the statutory requirement that independent counsel comply with DOJ policies:

> Finally, we do not think that the Act "impermissibly undermine[s]" the powers of the Executive Branch [citation omitted], or "disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." [citation omitted]. . . . The Act thus gives the Executive a degree of control over the power to initiate an investigation by the independent counsel. In addition, the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General, and once a counsel is appointed, the Act requires that the counsel abide by

> Justice Department policy unless it is not "possible" to do so.

487 U.S. at 695-96.

When Congress amended the Act in 1994 to strengthen this requirement even beyond the language quoted in *Morrison*, its intent in doing so was stated clearly:

> As amended, section 594(f) maintains the policy that Independent Counsel are expected to follow the same rules as the Department of Justice in their investigations and in making decisions on whether or not to seek indictments. This provision is designed to help ensure that an individual who is the subject of an Independent Counsel investigation will not be held to a higher standard or subject to stricter enforcement of the laws than other individuals.

H.R. Rpt. No. 103-224, 103rd Cong., 1st Sess. at 20 (1993). *See also* S. Rpt. No. 103-101, 103rd Cong., 1st Sess. at 32 (1993). In opposing re-authorization of the independent counsel statute, former Attorney General Benjamin R. Civiletti testified that the statute has failed to achieve its original purpose of providing equal justice to everyone, "regardless of one's high position in government or relationship to anyone in such a position." Statement of Benjamin R. Civiletti before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, March 10, 1999.

The Circuit's opinion cavalierly dismisses the statutory requirement that an independent counsel follow DOJ policy by concluding that Mr. Blackley has no remedy under the Act even if IC Smaltz did violate DOJ policy and even if the DOJ had previously declined prosecution. If this holding is permitted to stand, it undercuts the determination by this

Court in *Morrison* that the requirement that an independent counsel comply with DOJ policy is a critical factor in upholding the constitutionality of the statute.

In his opposition to Mr. Blackley's Emergency Motion to Stay the Mandate, IC Smaltz argued against a stay because it was "highly unlikely that the Supreme Court will devote part of its limited docket to a statute that might well not exist in its present form before the matter can be heard." Opp. at 4. This cynical view, expressed by an independent counsel who has been subject to great criticism for abusing his powers, suggests that this Court will ignore the abuses that have led to the demise of the independent counsel law, in effect, providing no justice to Mr. Blackley and others who are caught up in existing independent counsel investigations and prosecutions.[3] This Court should review this case because of the significance given in *Morrison* to the requirement that independent counsel comply with DOJ policy.

II. The United States District Court for the District of Columbia's Failure to Instruct the Jury that It Must Find That Mr. Blackley's Failure to Report Various Checks He Received Violated a Legal Duty in Order to Find Him Guilty of Concealment Under 18 U.S.C. § 1001 Violates This Court's Decisions in United States v. Gaudin, 515 U.S. 506 (1995), and Richardson v. United States, No. 97-8629, 1999 U.S. Lexis 3640 (1999).

The District Court's failure to instruct the jury as to the elements of 18 U.S.C. § 1001 and the Circuit Court's decision upholding this failure violate this Court's decisions requiring that every element of a crime of which a defendant

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[3] This Court has already rejected IC Smaltz's notion that a person can be convicted under the gratuity statute without any showing beyond the fact that a gratuity was given because of the recipient's official position. *United States v. Sun-Diamond*, 119 S. Ct. 1402 (1999).

is charged be properly submitted to a jury. *See Richardson v. United States*, No. 97-8629, 1999 U.S. Lexis 3640 (1999); *United States v. Gaudin*, 515 U.S. 506 (1995). Mr. Blackley's proposed instructions set out the statute under which he was charged (18 U.S.C. § 1001), the various clauses (concealment and false representation) establishing culpability under that statute, and the elements of each clause. The District Court rejected these instructions, and thus, failed to articulate the requirements for charges under 18 U.S.C. § 1001. The District Court's instructions failed to distinguish between the false representation and concealment clauses. In particular, the instructions did not instruct the jury that to find Mr. Blackley guilty under the concealment clause, the jury must find that he had a legal duty to disclose.

For a false statements count to be properly pled under the concealment clause, the majority of Circuits hold that a defendant must have had a duty to disclose the specific information. *See, e.g., United States v. Curran*, 20 F.3d 560, 566 (3d Cir. 1994); *United States v. Zalman*, 870 F.2d 1047, 1055 (6th Cir. 1989), *cert. denied sub nom., Sharifinassab v. United States*, 492 U.S. 921 (1989); *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir. 1987), *cert. denied*, 484 U.S. 958 (1987); *United States v. Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). *See also United States v. Crop Growers Corp.*, 954 F. Supp. 335, 344 (D.D.C. 1997). The rationale of these courts is based on due process concerns. "[W]here a statute or regulation imposes no duty whatever to disclose information, due process concerns require that

criminal liability not be based on omission of such information." *Crop Growers Corp.*, 954 F. Supp. at 345.

The jury in this case was not told that to find Mr. Blackley guilty under the concealment clause, it had to find that Mr. Blackley's failure to report one or more of the 11 checks violated a legal duty. Despite the fact that the existence of a legal duty is an element of the crime, the jury in this case was not instructed that compliance with the legal duties set out in the 1993 SF 278 Form was the standard against which it was to evaluate Mr. Blackley's failure to report each of the 11 checks.

The Circuit Court stated that since this Court's decision in *Gaudin*, 515 U.S. 506, it is uncertain whether the judicially created requirement of proving that a defendant has a legal duty to disclose needs to be presented to the jury or is a legal question to be decided by the court. Appendix A, 16a. This Court has held, however, that the "Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23. The Circuit Court conceded that some Circuits have determined that an element of the concealment clause of 18 U.S.C. § 1001 is that the defendant have a legal duty to disclose and there is no authority to the contrary. *See* Appendix A, 16a.

As this Court recently confirmed in *Richardson*, to determine that such a requirement, that is, a legal duty to disclose, is an element of the concealment clause of 18 U.S.C. § 1001 "is consistent with a tradition of requiring jury unanimity where the issue is whether a defendant has engaged in conduct that violates the law." No. 97-8629, 1999 U.S. Lexis 3640, at *11. Moreover, similar to the statute that this Court considered in *Richardson*, the breadth of the false statements statute, including its various means of violation,

"aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." *Id.* at *12-13. For this reason, the District Court's failure to instruct the jury concerning the element of legal duty in this matter was error just as the lower court's failure to instruct the jury in *Richardson* that it must unanimously agree not only that the defendant committed some "continuing series of violations," but also about which specific "violations" make up that "continuing series" was error. *Id.* Following this Court's reasoning in *Richardson*, the jury in this matter should have been instructed to focus on each particular clause of the false statements statute and its particular elements, not just the statute as a whole.

The Circuit Court also assumed that even if it was error to fail to instruct the jury concerning whether Mr. Blackley had a duty to disclose, the jury could have found Mr. Blackley guilty of concealment. Appendix A, 17a. The Circuit Court assumes that this is the case because the jury was instructed as to Mr. Blackley's theory that he did not believe that he was required to disclose the information he allegedly concealed. *Id.* Consideration of Mr. Blackley's theory of defense, however, is not a justification for the District Court's failure to properly instruct the jury as a matter of law. Mr. Blackley's theory of defense was based on lack of intent to violate the statute, not whether he had a duty to disclose.

In addition, the District Court's error was not harmless because the Circuit Court could not have concluded beyond a reasonable doubt that the jury verdict would have been the same absent the error. *See Neder v. United States*, No. 97-1985, 1999 U.S. Lexis 4007 (1999). The Circuit Court stated that "even if there was error in not submitting the duty-to-

disclose instruction to the jury, it is unimaginable that the jury could have found Blackley guilty of concealment in count one without first finding a duty to disclose." Appendix A, 17a. This conclusion is without merit because, unlike the evidence presented in *Neder*, the OIC presented no evidence that Mr. Blackley had a duty to disclose any of the checks he received in 1993 on his SF 278 Form.[4] Thus, there is no basis to assume that the jury considered that Mr. Blackley had a duty to disclose when it considered the matter and found him guilty of the charges.

For these reasons, the Circuit Court's opinion affirming the lower court's jury instructions in this matter should be reviewed by this Court because the decision is inconsistent with this Court's case law and due process requirements.

III. The Sentencing Court's Eight Level Upward Departure Increasing a Sentence for False Statements Under the Fraud Guidelines from Possible Probation to 27-Months Imprisonment Based Upon Mr. Blackley's Status as a Public Official Violates the Requirements of Federal Sentencing Guidelines, the Sentencing Reform Act of 1984, and This Court's Decision in United States v. Koon, 518 U.S. 81 (1996).

To ensure conformity with the guidelines sentencing structure and the Sentencing Reform Act of 1984, the Sentencing Commission severely restricted the use of upward departures to only those situations where "there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing

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[4] The OIC failed to prove beyond a reasonable doubt that Mr. Blackley had a duty to disclose the payments listed in count one of the indictment on his 1993 SF 278 Form. *See Chiarella v. United States*, 445 U.S. 222 (1980). There was no evidence offered at trial concerning the false statements charges other than the 11 checks.

Commission in formulating the guidelines." 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0. As a result, upward departures are exceedingly rare. *See United States v. Dyce*, 91 F.3d 1462, 1466 (D.C. Cir.), *cert. denied*, 519 U.S. 1018 (1996) (". . . [W]e underscore what is implicit in the word "extraordinary" and explicit in the Guidelines themselves: departures on such a basis should be rare.").

This Court confirmed the strict limitations imposed on departures in *Koon*, 518 U.S. 81, and stated that a district court "must bear in mind the [Sentencing] Commission's expectation that departures based on grounds not mentioned in the Guidelines will be 'highly infrequent.'" *Id.* at 96. While giving due deference to the district courts' application of guidelines to the facts, this Court instructed appellate courts to determine that "discretion was not guided by erroneous legal conclusions" as part of their review of departure decisions. *Id.* at 100.

In upholding the District Court's eight level upward departure against Mr. Blackley, the Circuit Court ignored the restrictive standards imposed by *Koon* and simply concluded that the departure was "well within the broad discretion allowed the district court in such matters." Appendix A, 19a. In so doing, the Circuit Court has effectively eviscerated the Sentencing Commission's benchmark principle that such departures should be rarely utilized. U.S.S.G. § 5K2.0 (Commentary).

At the presentence hearing on March 13, 1998, the District Court stated: "I agree that there was no direct loss in this case, but the defendant was a high level government official who failed to disclose that he received at least $20,000 from people who had matters pending before the Department of Agriculture that fell within his purview." Appendix I, 173a. Counsel for Mr. Blackley told the court at the sentencing

hearing on March 18 that the court erred in its finding that Mr. Fuller, the person responsible for all but $1,000, had business pending before the USDA:

> [In my memorandum to the court,] I tried to convey, and obviously you've heard this from me before, Your Honor, that although we in no way diminish the amount of $20,000, as we have tried to point out, virtually all of this money came from Charles Fuller, who had, in effect, no business pending before the Department of Agriculture about which any decision could be made.

Appendix I, 177a. Further, as noted previously, the Cochran appeal was not within Mr. Blackley's "purview."

In response, the District Court said:

> Well, I find that the defendant clearly continued to receive monies from businesspeople from whom the Department of Agriculture provided subsidies during his employment at USDA, although he was informed that he was not allowed to receive such payments. The defendant not only received them, but he also lied about the fact that he received them. Moreover, the defendant was in a high government position as Chief of Staff to the Secretary of Agriculture when he received these monies. I find that this is a factor not considered in the fraud section of the guidelines. Contrary to the defendant, I don't think the Commission ever made a deliberate decision not to include this factor; I think they didn't deal with it at all, and, in this court's view, an eight-level upward departure is appropriate.

Appendix I, 184a. The District Court never explained why it believed Mr. Blackley was not allowed to receive the

payments he did. Mr. Blackley was not charged with improperly receiving payments. The charges (and all the evidence) related solely to Mr. Blackley's failure to disclose that he had received payments.

The District Court's primary justification for its upward departure was that "false statements by high level government officials are not adequately taken into account by the guidelines, . . ." Appendix I, 173a. The Circuit Court misinterpreted Sentencing Commission requirements and Supreme Court case law and overlooked the proper allocation of responsibilities between the Sentencing Commission and the courts in affirming the District Court's conclusion. As stated by this Court in *Koon*, sentencing policy resides in the Sentencing Commission and not in the courts. 518 U.S. at 108.

The sentencing court determined that high government officials should receive upward departures for fraud guideline offenses simply because of their status. Both the District Court and the Circuit Court concluded that there can be an upward departure for this reason because the Sentencing Commission never reached the question. As the District Court stated, "the sentence is an upward departure based on the defendant's position as a high government official, a fact not considered by the fraud section of the guidelines." Appendix I, 196a. This decision, if allowed to stand, establishes a sentencing policy that permits district courts to treat public officials differently under the fraud guidelines than anyone else. Such a policy decision is not one for the District Court to make. In *Koon*, this Court said that allowing a district court to decide whether a particular factor should always or never be taken into account transgresses the policy-making authority vested in the Commission. 518 U.S. at 106-07.

Indeed, the Circuit Court and the District Court further erred in concluding that the Commission did not take the matter of offender status as a public official into account when it fashioned the fraud guidelines. As the Court in *Koon* found, "[i]f a factor is unmentioned in the Guidelines, the court must, after considering the 'structure and theory of both relevant individual guidelines *and the Guidelines taken as a whole*,' decide whether it is sufficient to take the case out of the Guideline's heartland." *Id.* at 96 (emphasis added). In reviewing the guidelines as a whole, it is apparent that the Sentencing Commission gave careful and thorough consideration to a defendant's position as a government official as a broad policy matter.

Consideration of public officials' status is found throughout the guidelines. *See, e.g.*, U.S.S.G. §§ 2C1.1, 2C1.2, 2C1.7, 2H1.1. The Circuit Court decided that the Sentencing Commission only included the high level government official factor for those offenses where its occurrence is "salient." Appendix A, 19a. Even assuming this is true, it proves the point being made here. The Sentencing Commission authorized adjustments or departures for public officials only in those situations where the misconduct was directly pertinent to their official duties or where there were other strong policy reasons for doing so. As an illustration, the Commission mandated an increase of six levels if an offense involving abuses of individual rights was committed by a defendant who was a public official at the time he or she committed the offense. *See* U.S.S.G. § 2H1.1. This was a policy decision made by the Commission. It could also have concluded as a matter of policy that defendants convicted of making false statements can or must be subject to adjustments or upward departures if they were public officials at the time the statements were made. But the Commission decided not to do so, and a district court does not have co-extensive

authority to fashion such a policy in the absence of Sentencing Commission action.

The District Court's "dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range." U.S.S.G. § 5K2.0 (Commentary). It is difficult to describe the District Court's reasoning and the Circuit Court's endorsement of that reasoning as anything but dissatisfaction with the available sentencing range.

The Circuit Court erred in stating that "the departure made Blackley's sentence more closely approximate what would follow for kindred crimes committed by high government officials under provisions such as § 2C1.2 itself," the gratuity guideline. Appendix A, 19a. The indictment did not allege that Mr. Blackley received a gratuity. He was not charged with receiving a gratuity. Moreover, there was no evidence presented at trial demonstrating that Mr. Blackley received a gratuity by failing to report certain monies on his 1993 SF 278 Form.

As this Court recently held in *United States v. Sun-Diamond Growers of California*, 119 S. Ct. 1402 (1999), "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific "official act" for or because of which it was given." *Id.* at 1411. There was no allegation that Mr. Blackley's receipt of certain monies from farmers who received subsidies from the USDA was for or because of a specific "official act." The allegations were solely related to Mr. Blackley's failure to report approximately $22,000 on his 1993 SF 278 Form and later statements to inspectors general concerning his receipt of monies in 1993. More importantly, there is nothing in the

sentencing guidelines as a whole, or in U.S.S.G. § 2F1.1 in particular, that required or encouraged the sentencing court to "more approximate a kindred crime" when that supposedly "kindred" crime was not at issue and was not charged. Appendix A, 19a.

Following this Court's determination that the language of the statutory gratuities provision should be interpreted to be a "scalpel" rather than a "meat axe," this Court should avoid applying the gratuities guideline, U.S.S.G. § 2C1.2, to unrelated crimes, such as the false statements statute involved in this case. *Sun-Diamond*, 119 S. Ct. at 1410. To allow otherwise would be contrary to this Court's holdings and the Sentencing Commission's mandate to draft guidelines that govern the courts' sentencing of defendants in a way that is uniform and avoids discrimination in sentencing.

IV. The Sentencing Court's Eight Level Upward Departure Increasing Mr. Blackley's Sentence for False Statements Offenses Under the Fraud Guidelines from Possible Probation to 27-Months Imprisonment When There Was No Monetary Loss and No Charge or Proof of an Illegal Gratuity is Unreasonable Under This Court's Decisions in Williams v. United States, 503 U.S. 193 (1992), and United States v. Sun-Diamond, 119 S. Ct. 1402 (1999).

The Circuit Court acknowledged that "at first blush the number of levels seems high" in this case. Appendix A, 19a. The Circuit Court went on to state, however, that "the departure made Blackley's sentence more closely approximate what would follow for kindred crimes committed by high government officials under provisions such as § 2C1.2 itself." *Id.* Because § 2C1.2 relates to receiving a gratuity, a crime for which Mr. Blackley was neither charged nor convicted, and a crime which is not similar to Mr. Blackley's actions, the upward departure is unreasonable.

Receiving a gratuity is not a "kindred" crime to making a false statement and the Circuit decision provides no reason to believe as much.[5] The indictment and evidence did not link the receipt of money by Mr. Blackley with any official action on his part. Further, the indictment and evidence fail to allege or show what the payments represented, if anything. Because the indictment and evidence were devoid of these basic requirements for a gratuities violation, the fraud guidelines are without question the most applicable to the offense charged. *See Sun-Diamond*, 119 S. Ct. 1402.

A few Circuit Courts have approved of sentencing courts examining analogous sentencing guidelines in measuring the extent of a departure, once the sentencing court decides that a departure is warranted because the circumstances take the matter outside of the "heartland" of the sentencing guidelines. *See, e.g., United States v. Horton*, 98 F.3d 313, 317 (7th Cir. 1996). The sentencing courts must be careful, however, to ensure that the analogy selected is an appropriate one. *United States v. Leahy*, 169 F.3d 433, 445 (7th Cir. 1999). For example, the Seventh Circuit in *Horton*, held that the sentencing court's analogy to § 2A6.1(b)(1), the guideline that applies to threatening communications accompanied by "conduct indicating that the defendant intends to carry out such threat," for its upward departure of eight levels was unreasonable when the defendant pled guilty to making a bomb threat against a federal building one day after the bombing of the Alfred P. Murrah Building in Oklahoma City. 98 F.3d at 318.

The *Horton* Court reasoned that for such an analogy to apply, the defendant must have engaged in conduct beyond the

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[5] "Kindred" is defined as "having a similar or related origin, nature, or character." Webster's II New Riverside University Dictionary (1994).

bounds of making an empty threat because § 2A6.1(b)(1) required the defendant to take some action that demonstrated his willingness to carry out his threat. 98 F.3d at 318-19. The same is true here. Any analogy to the gratuities guideline is misplaced because there was no allegation and no evidence that Mr. Blackley received any monies for or because of any "official act." *See Sun-Diamond*, 119 S.Ct. 1402. *See also Leahy*, 169 F.3d at 446-48 (upward departure of ten levels was unreasonable because sentencing court analogized to inappropriate guideline).

Under these circumstances, the upward departure of eight levels violates the reasonableness standard set forth by this Court in *Williams*, 503 U.S. 193. Reasonableness must be assessed in light of the factors under the guidelines as well as the reasons provided for the sentence in question by the district court. *See Dyce*, 91 F.3d at 1465-67. In this case, the District Court stated that the eight level upward departure was based upon Mr. Blackley's position as a high level government official. Increasing a sentence from a possible period of probation to incarceration for 27-months on this basis is entirely unreasonable. *See United States v. Davis*, 170 F.3d 617, 629-31 (6th Cir. 1999) (upward departure of four levels for telemarketing fraud was unreasonable under guideline for extreme conduct or based on the number of victims).

Unreasonableness is demonstrated by reviewing the adjustments and departures permitted for offenses where the conduct involved is far more egregious than in this case. For example, U.S.S.G. § 3B1.1 provides for a *two level* increase for abuse of position of trust. The District Court's statements seem to be equating Mr. Blackley's conduct with such an act. Yet, the Sentencing Commission viewed the act as only increasing the level by two, while the District Court increased by eight, four times as severe. This is unreasonable on its

face. *See also* § 2Q1.2(b)(1) ("If the use or the threat of force against any person was involved, increase by five levels."); § 2N1.1(b)(1)(B) ("If any victim sustained serious bodily injury, increase by two levels.").

The fraud guidelines themselves identify a wide variety of serious conduct that warrants increases in an offense level, but none rises to anywhere near the level of the upward departure in this case. *See, e.g.*, U.S.S.G. § 2F1.1(b)(3) ("If the offense involved a misrepresentation that the defendant was acting on behalf of a charitable, educational, . . . organization . . . increase by *two levels.*"); § 2F1.1(b)(4)(A) ("If the offense involved (A) the conscious or reckless risk of serious bodily injury, or (B) possession of a dangerous weapon [ ] in connection with the offense, increase by *2 levels.*"). Further, to warrant an eight level upward departure under § 2F1.1(b)(1)(I), the loss to the victim would have to amount to more than $200,000. In this case there was no monetary loss.

For these reasons, the District of Columbia Circuit's opinion affirming the lower court's upward departure should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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June 28, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 98-3036

UNITED STATES of America,
Appellee,

v.

Ronald H. BLACKLEY, Sr.,
Appellant.

Argued Oct. 19, 1998
Decided Jan. 26, 1999

Before: WILLIAMS, GINSBURG and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

Ronald Blackley, one time Chief of Staff to Secretary of Agriculture Michael Espy, was convicted of three counts of making false statements relating to over $22,000 that he received from individuals regulated by the Department of Agriculture. Blackley was investigated and prosecuted by the Office of Independent Counsel appointed to investigate allegations of gratuities received by Secretary Espy. On appeal, Blackley's principal claim is that the crimes charged lie outside the Independent Counsel's jurisdiction. Rejecting that and Blackley's other contentions, we affirm.

* * *

On August 8, 1994 the Attorney General applied under 28 U.S.C. § 592(c)(1) to the special division of the United States Court of Appeals for the District of Columbia for the purpose of appointing independent counsels, *see* 28 U.S.C. § 49 (the "Special Division"), seeking appointment of an independent counsel "to investigate whether any violations of federal crimes were committed by Secretary Espy, and to determine whether prosecution is warranted." The Special Division's September 9, 1994 order (the "original order") appointed Donald C. Smaltz as Independent Counsel, with the authority and jurisdiction to:

> [I]nvestigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether [Secretary Espy] has committed a violation of any federal criminal law . . . relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

September 9, 1994 Order of Special Division at 1. The original order also gave the Independent Counsel jurisdiction over crimes "connected with" this core jurisdiction. We save for later the precise wording of these additional grants. The Independent Counsel later applied to the Special Division asking for a further "referral" under 28 U.S.C. § 594(e).[1] On April 1, 1996, over the objection of the Attorney General, the Special Division approved the application and issued an order stating that the Independent Counsel had jurisdiction to:

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[1] 28 U.S.C. § 594(e) states that "[a]n independent counsel may ask the Attorney General or the [Special Division] to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the [Special Division], may refer such matters."

> [I]nvestigate and prosecute any violation of any federal law . . . related to any application, appeal, or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process.

April 1, 1996 Order of Special Division. In doing so, the Special Division said that it was "interpreting, but not expanding, the independent counsel's original prosecutorial jurisdiction." *In re Espy*, 80 F.3d 501, 507 (D.C.Cir.1996). It found that "the new matter is demonstrably related to the factual circumstances underlying the Attorney General's original investigation and request for appointment of an independent counsel." *Id.* at 508.

On April 22, 1997 the Independent Counsel secured an indictment of Blackley on three counts of making false statements in violation of 18 U.S.C. § 1001. The indictment alleged that Blackley, while serving as Chief of Staff at the U.S. Department of Agriculture, received more than $22,000 from individuals regulated by the Department, and then lied about it on three separate occasions: once on his Executive Branch Public Financial Disclosure Form, SF 278, and then twice in sworn statements to the inspectors general of the Department and the United States Agency for International Development ("USAID"). In the sworn statement to the Department of Agriculture inspector general Blackley said,

> At the time I became chief of staff for Secretary Espy . . ., I severed myself from all of my prior businesses and financial interests. I no longer had any active connection with [various named companies] or any other company or business

> interest in Mississippi or elsewhere. I received absolutely no money or remuneration of any kind from any of these companies for work performed in 1993 after I became chief of staff. . . . The only income I have earned during the period during the period from January 21, 1993 to the present date, with the exception of the sale of my former residence in Greenville, is my salary from USDA.

And in a sworn statement before the USAID, he said, "After I ended my consulting business and entered U.S. Government service, I did not receive any remuneration of any kind from [a named client] or anyone else."

A jury found Blackley guilty on all three counts, and the district court sentenced him to 27 months imprisonment and three years of supervised release.

* * *

A. Jurisdiction of the Independent Counsel[2]

Defendant's first jurisdictional claim rests solely on the fact that the text of the indictment fails to lay out the trail connecting the original grant of jurisdiction to the charged violations. As Rule 7(c)(1) of the Federal Rules of Criminal Procedure specifies that an indictment must contain "a plain, concise and definite written statement of the essential facts constituting the offense charged," we can imagine an

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[2] Blackley in part appears to cloak his challenge to the jurisdiction granted by the original order in an attack on the Special Division's April 1, 1996 referral, as he did before the trial court (*see* "Motion to Dismiss Indictment" at 10-11). But as the district court appears to have read the challenge as going at least in part to the scope of the original order, *see United States v. Blackley*, 986 F.Supp. 607, 610 (D.D.C.1997), we regard the relation between the indictment and the original order as properly before us.

argument that language setting out the connective trail would be offensive surplusage, which the court might strike under Rule 7(d). But the reverse—that such language is required—seems without foundation. Defendant cites no case, rule or statute supporting the claim, and points to no inconvenience that the omission presents for him. In a case where the connection between the relevant referral or referrals and the facts set forth in the indictment or developed at trial was unclear, presumably the defendant could secure dismissal of the indictment if the independent counsel failed, on motion to dismiss for want of jurisdiction, to make a record of the necessary connective links. Cf. Fed.R.Crim.P. 16(a)(2) (limiting required disclosure of prosecutor's investigative materials in ordinary case). But that possibility is no basis for cluttering up the indictment.

More substantively, Blackley argues that the indictment is not within the jurisdiction granted in the Special Division's original order. The Independent Counsel evidently regards that as the proper jurisdictional question; he makes no claim that the April 1996 referral expanded his jurisdiction. This view, seemingly shared by both parties, tracks the position of the Special Division itself, which, as we noted, said in making the April 1996 referral that it was "interpreting, but not expanding, the independent counsel's original prosecutorial jurisdiction, . . . mak[ing] explicit the independent counsel's jurisdiction over a matter that was implicitly included in the original grant." *In re Espy*, 80 F.3d at 507. Nor does the Independent Counsel make the argument, which we consider in *United States v. Hubbell*, 167 F.3d 552, 557-60 (D.C.Cir.1999) released today, that the Special Division's interpretation of the original order, set forth in the later referral, is entitled to deference. Accordingly, we review *de*

novo the relationship between the indictment and the jurisdictional grant of the original order.[3]

In analyzing the relation between the offenses charged here and the language of the original order (including both its statement of the core offenses and the various ancillary clauses), Blackley frequently invokes a phrase used by the Supreme Court in *Morrison v. Olson*, 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988), "demonstrably related." We are not at all sure that the adverb "demonstrably" adds much to the concept of relatedness, other than perhaps to say that if the relation depends on some facts, then the facts may be litigated. Whatever its force, however, the phrase was not used by the Court in relation to the present issue at all. The Court used it solely in connection with the anterior issue of the relation between the Attorney General's initial investigation and presentation to the Special Division, on the one hand, and that Division's original grant of authority to an independent counsel, on the other. In resisting a constitutional attack on the vesting of power in the Special Division, the Court observed:

> In order for the Division's definition of the counsel's jurisdiction to be truly "incidental" to its power to appoint, the jurisdiction that the court decides upon must be demonstrably related to the factual circumstances that gave rise to the Attorney General's investigation and request for the

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[3] As the Independent Counsel only marginally invokes the April 1996 referral as support for his jurisdiction over the crimes charged in the indictment, and we in no way rely on it in upholding the indictment as within the Independent Counsel's jurisdiction, Blackley's contention that the district court wrongly failed to review that referral itself appears entirely moot.

> appointment of the independent counsel in the particular case.

Id. at 679, 108 S.Ct. 2597. Here, of course, the defendant is not challenging the constitutionality of the Special Division's grant of jurisdiction, but the fit of the present prosecution within that grant. Cf. *United States v. Tucker*, 78 F.3d 1313, 1321 (8th Cir.1996) (holding that the "demonstrably related" language did not govern the Independent Counsel's jurisdiction under a referral).

As we mentioned above, a number of clauses of the original order explicitly authorize the Independent Counsel to go beyond crimes possibly committed by Secretary Espy in accepting gifts from persons with matters pending before the Department. Besides power to look into those, the order gave the Independent Counsel jurisdiction to:

> [1] . . . investigate other allegations or evidence of violation of any federal criminal law . . . by any organization or individual developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.
>
> [2] . . . investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.
>
> [3] . . . seek indictments and to prosecute any organizations or individuals involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including

> organizations or individuals who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.
>
> [4] . . . fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes . . . that may arise out of the above described matter, including perjury, obstruction of justice, obstruction of evidence, and intimidation of witnesses.
>
> September 9, 1994 Order of Special Division at 2, 3.

It is not claimed that any of the order's language is inconsistent with the Special Division's statutory authority. Nor do we think it could be claimed. Section 593(b)(3) states that the Division is to define the counsel's jurisdiction in a way that "shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter." 28 U.S.C. § 593(b)(3) (emphasis added). Further, the jurisdiction "shall also include the authority to investigate and prosecute Federal crimes . . . that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses." *Id.* (emphasis added). The second clause appears to make clear that the Independent Counsel's jurisdiction is to encompass criminal activity concealing, or otherwise thwarting the Independent Counsel's investigation or prosecution of, crimes

that satisfy the first "related to" clause. In the Division's order here, ancillary clauses [1] and [4] appear to track the first of the provisions in § 593(b)(3), while that of ancillary clauses [2] and [4] appear to implement the second Blackley proposes an interpretation of the order's jurisdictional scope that would allow little or no discernible weight to any of the ancillary language, except for that relating to crimes arising out of the investigation or prosecution itself, such as perjury or obstruction of justice. With that exception, he evidently reads the language as limiting the Independent Counsel to possible crimes committed in Espy's own acceptance of gifts.

This clearly cannot be. The word "relation" comprises more than identical twins. And just as a person is "related" not only to his parents and children, but to grandchildren and grandparents, the fact that a crime is in some sense a verbal step or two away from the core crime cannot alone render it unrelated. As we have said, the "central purpose of the special prosecutor provisions of the [Ethics in Government Act] is to permit the effective investigation and prosecution of high level government and campaign officials." *United States v. Wilson*, 26 F.3d 142, 148 (D.C.Cir.1994) (emphasis added). Discussing the "related to" language of § 593(b)(3), we noted that "the scope of a special prosecutor's investigatory jurisdiction can be both wide in perimeter and fuzzy at the borders." *Id.*

Thus, the jurisdiction to look into matters "related to" the core areas of initial inquiry must allow the Independent Counsel enough leeway to investigate and prosecute such matters as are appropriate for him to effectively carry out his mandate. We think such effectiveness can be secured only if the Independent Counsel is at least able to pursue crimes by the original target's close associates in the field of activity under investigation, including crimes that either are of the same sort as the originally specified set of crimes or are

ancillary to the commission or concealment of such crimes. Whether an independent counsel has any further scope we need not decide here; obviously his jurisdiction is limited, but this case is squarely within the limits.

The position description for Blackley as Chief of Staff to Secretary Espy characterized him as the Secretary's "alter ego,"; and he played that role in the very activity—running the Department—in which Espy's alleged offenses were committed. His alleged non-disclosures were of sums received from parties doing business with the Department, thus paralleling the Espy allegations. Furthermore, concealment of such receipts, especially in the context of a financial disclosure form intended to bring suspicious influences to the surface and in response to questions of inspectors general, tends not only to prevent discovery of underlying crimes such as receipts of bribes or gratuities, but also to reflect the perpetrator's consciousness of guilt in those receipts.

The proximity of the relation here is underscored by Department of Justice policy (the subject of a separate challenge by Blackley). Justice allows its attorneys to use prosecutions under § 1001 as a vehicle for pursuing public corruption crimes:

> [U]nderlying misconduct is frequently the reason for the defendant's indictment [for false statements] with section 1001 merely being the vehicle for prosecution because of proof problems with more obviously applicable statutes . . . False information on financial disclosure forms frequently masks such underlying offenses as receipt of bribes or gratuities, or conflicts of interest. When prosecution for those offenses is not practicable, section 1001 is an alternative.

9A DOJ Manual at 9-1938.122-23 (Supp.1988) (emphasis added). This confirms us in finding that the relation between Blackley's § 1001 violations and the core charges set out in the original order is tight enough to meet the "related to" criterion of § 593(b)(3) and the order itself.

Included among Blackley's jurisdictional attacks is his claim that the Independent Counsel violated § 594(f)(1) of the Ethics in Government Act, which provides that an independent counsel "shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." He claims that here the Independent Counsel violated DOJ policy guidelines, which provide that DOJ attorneys should not prosecute an Ethics in Government Act case under § 1001 "unless the nondisclosure conceals significant underlying wrongdoing." 9A DOJ Manual at 9-1938.123 (1988). Detecting a transgression of the Manual, Blackley argues that it somehow undermines the prosecutorial jurisdiction of the Independent Counsel.

We think Blackley has missed the real defect here—the lack of any cause of action or remedies for defendants like him under the Manual or § 594(f)(1). The Manual itself says that it "is not intended to confer any rights, privileges or benefits on prospective or actual witnesses or defendants. It is also not intended to have the force of law or of a United States Department of Justice directive." 9A DOJ Manual at 9-1938.3. As defendant implicitly acknowledges, violations of Manual policies by DOJ attorneys or other federal prosecutors afford a defendant no enforceable rights. *See, e.g., United States v. Kember*, 648 F.2d 1354, 1370 (D.C.Cir.1980); *United States v. Craveiro*, 907 F.2d 260, 263-64 (1st Cir.1990).

Blackley argues, however, that here the DOJ policy is backed by a statute. While that is true in a sense, it misses the point. In the interest of having the target of an Independent Counsel's prosecution treated no worse than an ordinary defendant, § 594(f)(1) subjects the Independent Counsel to the same guidelines. *See* S.Rep. No. 97-496 (1982), quoted at H. Rep. No. 103-224, 103rd Cong., 1st Sess. 1993, 1993 WL 302057 at *20 (special prosecutor should act so as to assure that "treatment of officials is equal to that given to ordinary citizens under similar circumstances"). Thus if the Manual explicitly states that it confers no substantive rights on the defendant, the parallelism sought to be achieved by § 594(f)(1) suggests that the defendant here should also be unable to escape conviction by claiming a violation of the policy.

Further, the legislative history suggests that Congress intended that the consequence of a failure to follow these policies would be for the Independent Counsel to explain his decision, not for the guilty defendant to be set free:

> In determining whether it is possible to comply with these policies, the [Independent Counsel] should be guided by his perception of fundamental fairness and of what is required to conduct the investigation conscientiously. . . . If he does deviate from established practices of the Department, the [Independent Counsel] should thoroughly explain his reasons for doing so in his report to the court at the conclusion of his investigation.

S.Rep. No. 97-496 (1982), quoted at H. Rep. No. 103-224, 103d Cong., 1st Sess. 1993, 1993 WL 302057, at *20. Regardless of the possibility of other remedies under § 594(f)(1), as to which we express no opinion, nothing in the language of the provision or the structure of the Ethics in

Government Act suggests that the defendant should be able to escape a sanction otherwise due.

B. The Sufficiency of the Indictment

Blackley says the indictment didn't adequately notify him of the nature of the charges against him. In particular, he argues that count one, which charged him with failure to disclose on his SF 278 for the year 1993 some $22,025 received that year, simply enumerated the 11 checks through which the money was received (with their dates and amounts), plus all four categories on the form ("Assets and Income," "Gifts, Reimbursement and Travel Expenses," "Liabilities," and "Agreements or Arrangements"). Thus it did not connect any of the checks to a specific box on the form. Blackley makes a similar argument as to the other counts, saying that the indictment left him uncertain as to exactly which of his various denials was contradicted by his receipt of the $22,025.

Blackley cites *United States v. Nance*, 533 F.2d 699 (D.C.Cir.1976). There the defective counts of the indictment accused the defendant of falsely making the "following representations," but (amazingly) the representations did not follow; none was alleged. *Id.* at 700 n. 3. The present indictment plainly says that Blackley in his SF 278 falsely failed to disclose specified items of income. *Nance* gets Blackley nowhere.

But is it a fatal defect for an indictment to charge a failure to disclose and to assert four categories in the conjunctive, rather than specifying which box each check belonged in? Where the indictment alleges only one offense, it is proper to charge the different means for committing that offense in the conjunctive. *See Joyce v. United States*, 454 F.2d 971, 976 (D.C.Cir.1971); *United States v. UCO Oil Co.*, 546 F.2d 833, 838 (9th Cir.1976); Fed.R.Crim.P. 7(c)(1) (indictment

may allege that defendant committed offense "by one or more specified means"). In this case, the categories on the form simply enumerate the various ways the defendant could violate the disclosure requirements of the SF 278 form, and proof of any one of those allegations could sustain a conviction. *See UCO Oil Co.*, 546 F.2d at 838. And the proceeding on any count "will bar further prosecution on all matters alleged therein." *Joyce*, 454 F.2d at 977 (emphasis added). So the charging in the conjunctive here was proper and satisfies the two requirements for an indictment set out in *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)—telling the defendant what "he must be prepared to meet" and showing to what extent he might in any future proceeding plead former acquittal or conviction. *Id.* at 763-64, 82 S.Ct. 1038.

Blackley also argues that none of the counts pleaded any duty to disclose the $22,025. But in counts two and three the indictment spells out what can only be regarded as affirmative misstatements; and in count one the indictment obviously supplied the duty to disclose by spelling out the reporting requirements of SF-278 and explicitly stating that the defendant was required by law to respond truthfully to these requirements.

C. Adequacy of Jury Instructions

18 U.S.C. § 1001 criminalizes certain concealments from, or misrepresentations to, the government. The judge charged the first element in the following terms, the substance of which defendant does not dispute:

> The first element that you must find beyond a reasonable doubt is falsification or concealment. To find the defendant guilty of violating this statute, you must find that for each count charged in the indictment, the defendant either:

> a. falsified, concealed, or covered up by a trick, scheme, or device a fact; or
>
> b. made a false, fictitious or fraudulent statement or representation; or
>
> c. made or used a false writing or document containing a false, fictitious, or fraudulent statement or representation.
>
> You may find that the defendant performed more than one of these acts through a single course of action.

Blackley objects that this was error, because in its unanimity instruction the court failed to advise the jury that it had to find unanimously that each statement of the defendant violated a specific form of falsification, leaving it possible that jurors rested their verdict on different forms. The argument simply ignores the language of the charge. Immediately after the passage quoted, the judge said:

> However, to render a guilty verdict, you must unanimously agree on at least one of these three acts.

Under any reasonable reading of this instruction, the jury would understand that it must agree unanimously on which of the three the defendant violated.

The defendant's second argument, overlapping with his first, is that the district court erred in refusing to give the jury an instruction that to find the defendant guilty of concealment under § 1001, it must find that Blackley's failure to report the various checks he received violated a legal duty. Blackley contends that the legal duty to disclose is an element of the concealment prong of § 1001 that the government must prove to the jury. It is true that every element of a crime of which a defendant is charged should ordinarily be submitted to a jury. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310,

132 L.Ed.2d 444 (1995). It is also true that some circuits have held that the government must generally prove that a defendant has a legal duty to disclose before it can convict for concealment under § 1001. *See, e.g., United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir.1981). But it is uncertain, since Gaudin, whether this judicially created requirement is an element of the crime to be presented to the jury or a purely legal determination to be decided by the court. Cf. *United States v. Zalman*, 870 F.2d 1047, 1055 (6th Cir.1989) (pre-Gaudin case holding duty to disclose under § 1001 is a matter of law for the judge and not the jury). At least one post-Gaudin case has held that materiality itself, in certain criminal contexts such as tax crimes, is a purely legal question that is not to be submitted to the jury. *See United States v. Klausner*, 80 F.3d 55, 61 (2d Cir.1996) (distinguishing materiality in Gaudin as a mixed law and fact issue).

Assuming the duty to disclose is an element of concealment to be charged to the jury under § 1001, the district court's refusal to use Blackley's proposed charge would still not be reversible. Under circuit law, the absence of a jury instruction on an element of the crime is not reversible error where it is inconceivable that the jury could have found the defendant guilty of the crime without making a finding as to the omitted element. *See United States v. Winstead*, 74 F.3d 1313, 1321 (D.C.Cir.1996); *see also United States v. Parmelee*, 42 F.3d 387, 393 (7th Cir.1994) (holding that instructional error on missing element is harmless if "no rational jury could have found the defendant[ ] guilty of violating [the statute] without also making the proper finding as to the missing element"); *Redding v. Benson*, 739 F.2d 1360, 1363-64 (8th Cir.1984). Here, Blackley argued to the jury various forms of conceivable confusion in the SF 278 and in the statements to the inspectors general that might make his falsifications non-willful,

arguments that, given the judge's instruction that the jury must acquit Blackley if they found that he had acted in good faith, the jury had to reject to find him guilty. The judge also instructed the jury on Blackley's defense theory that he did not believe he was obliged to disclose the information he allegedly concealed, instructions that clearly placed before the jury the question of whether Blackley had a legal duty to disclose the 11 checks on his SF-278. Thus, even if there was error in not submitting the duty-to-disclose instruction to the jury, it is unimaginable that the jury could have found Blackley guilty of concealment in count one without first finding a duty to disclose.

Although the misrepresentations in counts two and three are the plainest kind of free-standing, affirmative misstatements, the district court's instructions nominally allowed the jury to convict under the concealment theory of § 1001, though without mention of a need to find a duty to disclose. But given the explicit and affirmative character of the misrepresentation, and the absence of any reliance by the prosecutor on questions posed by the Inspectors General (i.e., a claim that it was the nature of any such question that made Blackley's statements into concealments), the only way "concealment" could have come into the jury's deliberations on those counts would have been as a convoluted version of affirmative misrepresentation. For example, when someone swears that "the only money [he has] earned from January 21, 1993 to the present date [with an irrelevant exception] is [his] salary from the USDA," he is implicitly concealing any other earnings. Thus, no rational jury could have concluded that Blackley was guilty under counts two or three without simultaneously finding that he made affirmatively false statements.

D. The Departure from the Sentencing Guidelines

Finally Blackley objects to his sentence of 27 months, arguing that the district court made an upward departure on invalid grounds. The court found that Blackley should be sentenced under the fraud guideline, § 2F1.1 of the United States Sentencing Guidelines, which carries a base level of six. It also found that the specific offense characteristic of "more than minimal planning" applied, and increased Blackley's offense level by two, for a total of eight. It then made an eight-level upward departure, relying on a mix of factors that it believed were not considered by the guidelines in this context. These included the facts that (1) the defendant was a high-level official when he received monies from individuals regulated by the Department; (2) he was informed that he was not allowed to receive such payments; and (3) he twice lied under oath about their receipt.

As Blackley concedes, the fraud guidelines make no explicit provision for an adjustment for offenses committed by public officials. But he insists that the explicit provision for such an adjustment in connection with crimes involving the receipt of gratuity or the deprivation of the right to honest services implies a rejection of any comparable adjustment for fraud. U.S.S.G. §§ 2C1.2, 2C1.7. We think the inference quite weak, however. First, the fraud guidelines explicitly contemplate upward departures in circumstances that fall outside the main core. *See* U.S.S.G. § 2F1.1, Application Notes 10, 13. And in their more general treatment of departures the guidelines note the impossibility of covering all bases:

> Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.

U.S.S.G. § 5K2.0. Further, the Sentencing Commission's focus on high status in the government is understandable for offenses where its occurrence, though far from invariable, is salient. As high-level official status does not seem especially salient in fraud generally, the Commission's failing to treat it explicitly in that context implies little. *See Shook v. District of Columbia Fin. Responsibility and Management Assistance Auth.*, 132 F.3d 775, 782 (D.C.Cir.1998) (observing that the force of the *expressio unius* inference depends entirely on context). The case is thus radically different from *United States v. Sun-Diamond Growers*, 138 F.3d 961 (D.C.Cir.1998), in which we overturned an upward departure based on the high rank of the official who received a gratuity, the Secretary of Agriculture, on the ground that the Guidelines themselves, § 2C1.2, had covered precisely that. We found no material difference in rank or sensitivity between the Secretary and various officials explicitly enumerated in the associated Application Note as instances covered by the explicit provision for departure. *Id.* at 976.

Although at first blush the number of levels seems high, the departure made Blackley's sentence more closely approximate what would follow for kindred crimes committed by high government officials under provisions such as § 2C1.2 itself. We find the departure well within the broad discretion allowed the district court in such matters. *See Koon v. United States*, 518 U.S. 81, 98, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996).

* * *

Defendant also claims a violation of Rule 404(b) of the Federal Rules of Evidence, but the claim is too weak to merit discussion. And he argues the sufficiency of the evidence. On that issue he devotes his brief almost entirely to evidence that, if believed and given great weight, might have enabled a jury

reasonably to acquit. Perhaps so. But the possible reasonableness of acquittal is not, of course, the test—it is whether a jury could reasonably convict, as here it could.

The defendant's conviction and sentence are confirmed.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA

No. Crim A. 97-166 (RCL)

UNITED STATES of America,

v

Ronald H. BLACKLEY, Sr.,

Defendant.

Nov. 12, 1997

MEMORANDUM OPINION

LAMBERTH, District Judge.

This matter comes before the court on defendant's Motion to Dismiss Indictment of Ronald Henderson Blackley pursuant to Fed. R. Crim P. 12(b). For the reasons stated in this Memorandum Opinion, defendant's motion is denied.

I. BACKGROUND

A. The Chronology Leading Up to the Motion to Dismiss

On August 8, 1994, Attorney General Janet Reno applied for the appointment of an Independent Counsel under 28 U.S.C. § 592(c)(1) "to investigate whether any violations of federal criminal law were committed by Secretary of Agriculture Alphonso Michael (Mike) Espy, and to determine whether prosecution is warranted." On September 9, 1994, the Special Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia ("Special Division") appointed

Donald C. Smaltz as Independent Counsel with the power, authority and jurisdiction to investigate:

> whether Alphonso Michael (Mike) Espy, Secretary of Agriculture, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to the acceptance of gifts by him from organizations and individuals with business pending before the Department of Agriculture.
>
> other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any organization or individual developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.
>
> any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.
>
> [and] to seek indictments and to prosecute any organizations or individuals involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including organizations or individuals who have engaged in an unlawful conspiracy or who have aided and abetted any federal offense.

Under the authority of 28 U.S.C. § 594, the Special Division also granted the Independent Counsel the prosecutorial jurisdiction to fully investigate and prosecute "all matters and individuals whose acts may be related to that

subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of justice and intimidation of witnesses."

On January 25, 1996, the Independent Counsel filed under seal an Application for Referral of a Related Matter with the Special Division. This application was opposed by the Attorney General. Pursuant to 28 U.S.C. § 594(e), the Special Division granted the Independent Counsel's application on April 14, 1996, ordering referral of the related matter, and granting the following investigative and prosecutorial jurisdiction:

> The jurisdiction and authority to investigate and prosecute any violation of any federal law, other than a Class B or C misdemeanor, by any organization or individual, related to any application, appeal or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process.

In support of its grant of referral jurisdiction, the Special Division noted that Independent Counsel Smaltz had shown that the new matter was "demonstrably related to the factual circumstances that gave rise to the Attorney General's initial investigation and request for appointment of an independent counsel." *In re Espy*, 80 F.3d 501, 509 (D.C.Cir. 1996). Specifically, the Special Division noted "He [IC Smaltz] has identified evidence allegedly showing a pattern of conduct involving payments or gifts to Espy and his close associates

in return for favorable treatment by the Department of Agriculture." *Id.*

On April 22, 1997, a federal grand jury in the District of Columbia returned a three-count indictment against defendant Ronald Henderson Blackley, former Chief of Staff to Secretary of Agriculture Mike Espy. Specifically, it is alleged that Charles Fuller, a longtime friend and business associate of Mr. Blackley, caused to be made payments in the amount of $21,025 to Mr. Blackley and his wife Sharon Blackley between the dates of January 5, 1993 and December 15, 1993. Also, on or about May 22, 1993, Charles ("Buddy") Cochran, the owner and operator of a farming operation known as "Coco Planting Company" gave defendant Blackley and/or Sharon Blackley a check for $1,000 payable to Ron Blackley Jr., which was later deposited into the joint checking account of Ronald and Sharon Blackley. Both Fuller and Cochran sought and received monetary subsidies from the Department of Agriculture ("USDA") in 1993, the former receiving $63,000, and the latter $284,000.

In the first count of the indictment, the grand jury charged Blackley with knowingly and willfully making false, fictitious and fraudulent statements and representations for his failure to report the receipt of the $22,025 on his Public Financial Disclosure Report for 1993 ("Form SF 278"), in violation of the Ethics in Government Act, 18 U.S.C. § 1001. In the second count, it is alleged that Mr. Blackley signed a sworn declaration as part of the Department of Agriculture's Office of Inspector General's ("USDA-OIG") investigation of him that contained a false statement concerning his alleged receipt of aforementioned payments, also in violation of 18 U.S.C. § 1001. In the third count, Mr. Blackley is again charged with a violation of 18 U.S.C. § 1001 for a false statement regarding his alleged receipt of the aforementioned payments in a sworn declaration taken as part of a United

States Agency for International Development Office of Inspector General ("US AID-OIG") investigation as to whether he should retain his Top Secret security clearance.

B. The Motion to Dismiss

Mr. Blackley asks this court to dismiss the indictment, contending that the Independent Counsel is without jurisdiction to prosecute the aforementioned charges. He asserts that his prosecution is not about illegal gifts to Mike Espy, nor about improper intervention into the application, approval or review of Department of Agriculture subsidies. Therefore it does not charge misconduct cognizable under "the limited prosecutorial authority granted to the Independent Counsel." Supplemental Memorandum in Support of the Motion to Dismiss Based on Lack of Jurisdiction ("Supplemental Memorandum") at 2. He contends that the charges against him involve nothing more than the completeness of his 1993 financial disclosure statement, a matter he claims to be completely outside of the purview of the Special Division's jurisdictional grant, which is limited to charges concerning intervention in subsidy applications, appeals, and requests and federal criminal violations related to such interventions.

Defendant offers three specific challenges in support of his motion to dismiss the indictment. First, he alleges that there is not a sufficient connection or the requisite degree of relatedness between the offenses charged in the indictment and the Special Division's grant of jurisdiction. Second, he contends that this prosecution is statutorily impermissible because it is contrary to established Department of Justice policy proscribing prosecution of alleged violations of 18 U.S.C. § 1001, "unless the nondisclosure conceals significant underlying wrongdoing." Defendant claims that under section 594(f)(1) of the Ethics in Government Act, an Independent

Counsel is required to comply with the written and established policies of the Department of Justice respecting the enforcement of the criminal laws. This prosecution, Blackley claims, contravenes that DOJ policy and therefore the indictment must be dismissed as violative of section 594(f)(1). Finally, defendant's original Motion to Dismiss challenges the constitutionality of the Special Division's referral order. Defendant essentially argues that a referral of a related matter under section 594(e) is unconstitutional in cases in which the Attorney General specifically opposes the Independent Counsel's request. Each of these challenges will be addressed in turn.

II. ANALYSIS

A. The Argument That The Indictment Itself Fails to Demonstrate a Connection Between the Offense Charged and the Independent Counsel's Jurisdiction.

Mr. Blackley contends that there is no demonstrable causal or logical connection between the 18 U.S.C. § 1001 false statement violations alleged in the indictment and either the scope of the original mandate or the subsequent referred matter. Defendant argues that, "[i]f the alleged false statements charged in the Indictment fall within this aspect of the mandate [intervention in subsidy applications, appeals or review], the Indictment certainly does not allege it" and "if gifts to Secretary Espy are the predicate for Mr. Blackley's allegedly false statements, there is no indication of it in the Indictment." Supplemental Memorandum at 5. Defendant essentially argues that the relationship between the jurisdictional mandate and the charges brought by the Independent Counsel must be demonstrated in the language of the indictment, with something tantamount to a "statement of relatedness" establishing the required connection. Restated, Mr. Blackley contends that the failure to facially demonstrate

the logical relationship between the charges brought and the limited prosecutorial scope of the Special Division's order is fatal to the indictment.

As a threshold matter, the scope of the phrase "related to" in the context of the connection that must exist between an indictment and the jurisdictional mandate has been addressed by this district. In *United States v. Secord*, 725 F.Supp. 563 (D.D.C. 1989), the Independent Counsel obtained an indictment against General Richard V. Secord for perjury and obstruction arising out of Secord's testimony before Congress in connection with the Iran-Contra hearings. As in the instant case, Secord argued that the prosecution of perjury counts fell outside the jurisdiction granted to the Independent Counsel. The question before then-Chief Judge Aubrey E. Robinson, Jr. was whether the alleged perjury was "related to in any way" to the events specified in the Special Division's Order. *Id.* at 564. The court answered the question in the affirmative, stating, "Clearly, the answer is yes. It cannot be denied that the congressional investigation itself 'arose from' the events constituting the Iran-Contra initiative." *Id.* Because General Secord's congressional testimony was on the topic of Iran-Contra, and because his alleged perjury might have been motivated by a desire to conceal his role in the Iran-Contra affair, the court found the requisite degree of relatedness between the charges in the indictment and the subject matter of the Independent Counsel's jurisdiction to conclude that prosecutorial jurisdiction was proper. Significantly, the Poindexter court also noted that "[t]o demonstrate that one occurrence is 'related' to another, [the OIC] need only show that there is reasonable causal or logical connection between the two, some tenable correlation between events." *Id.* at 566.

At least two prosecutions brought by Independent Counsel Smaltz in conjunction with the Mike Espy

investigation have been challenged on jurisdictional grounds, with defendants claiming in both instances that the charges in the indictment were insufficiently related to the authority granted the Independent Counsel by the Special Division. In *United States v. Crop Growers Corp.*, 954 F.Supp. 335, 341-42 (D.D.C. 1997), the court found a legally sufficient relationship between illegal campaign contributions to Mike Espy's brother Henry and the Independent Counsel's mandate. Applying the above-cited Secord standard for "relatedness," ("a reasonable causal and logical connection") the court determined that "allegations that an organization with business pending before the Department of Agriculture made an illegal campaign contribution to Secretary Espy's brother to curry favor with the Secretary falls within the mandate of that Appointment Order." *Id.* at 342. The court concluded that a contribution to Henry Espy's campaign by one who had business before the Department of Agriculture could potentially influence the Secretary to intervene on behalf of the gift-giver. Consequently, the charged conduct--the campaign contribution--was causally and logically connected to the Special Division's jurisdictional grant--improper influence on the Secretary of Agriculture--and defendant's challenge to the indictment was denied.

Similarly, in *United States v. Sun-Diamond Growers of California*, 941 F. Supp. 1262 (D.D.C. 1996) defendants argued that seven counts in their indictments alleging a scheme to make unlawful corporate contributions to Henry Espy did not relate specifically to the subject of gratuities and therefore exceeded the Independent Counsel's jurisdiction. *Id.* at 1272. The court rejected this claim, holding that the counts in question were related to the original subject matter of the investigation, noting that "[t]he factual predicate is intertwined with the original core subject matter of the

Attorney General's original investigation as well as the subsequent related referral . . . " *Id.* at 1274.

Again, the court found the requisite "causal and logical connection" between individuals or organizations who helped retire Henry Espy's campaign debt via allegedly illegal contributions and the potential for improper influence upon Secretary Espy such that the Independent Counsel's jurisdiction over the challenged counts was properly exercised.

Significantly, in making these determinations of relatedness, neither the Secord nor Sun-Diamond Growers nor Crop-Growers courts required what defendant appears to be calling for here--that the text of the indictment provides the demonstrable causal and logical connection between the charged violations and the subject matter of the Independent Counsel's investigation. None of the case law even remotely suggests that the grand jury's failure to facially demonstrate relatedness is fatal to the sufficiency of the indictment. In fact, at least one of the aforementioned cases implies the opposite. "The relationship must be "demonstrable," that is, something that is evident initially and without great steps of logic. The courts are routinely called upon to draw lines, and this is simply another of those cases . . ." Secord, 725 F. Supp. at 567 (emphasis added). In each instance, the courts considered the Special Division's order, the challenged counts, and reached a conclusion as to whether the requirement of relatedness was satisfied. This court will now do the same in determining whether the language of the original order and/or the referred matter supports the Independent Counsel's prosecution of charges arising exclusively under 18 U.S.C. § 1001.

Though the Blackley prosecution is arguably within the scope of the Special Division's original jurisdictional grant,

the connection is more easily demonstrated by reference to the referred matter; consequently, this court will limit its consideration to that order. The April 1996 referral order permits the Independent Counsel to investigate and prosecute any violation of any federal law "related to any application, appeal, or request for subsidy . . . for which . . . Chief of Staff Ronald Blackley intervened in the application, approval or review process." Each count in the indictment contends that Ronald Blackley made a false statement by failing to disclose his receipt of payments totaling $22,025, first on his Form SF-278, then pursuant to the USDA-OIG sworn declaration, and finally, pursuant to the U.S. AID-OIG sworn declaration. The background section of the indictment explains that this income was allegedly received from Mr. Fuller & Mr. Cochran, who both sought and received subsidies from the Department of Agriculture in 1993, the same year in which the alleged payments were received by Blackley. Though defendant cannot discern the "reasonable causal or logical connection" between the alleged false statements and the jurisdictional mandate, this court can. An endeavor to conceal payments received from a Department of Agriculture subsidy applicant could be a causal consequence of possible intervention in the application process on behalf of those from whom he received payment. It is both logical and reasonable to surmise that if Ronald Blackley improperly intervened in either Fuller and/or Cochran's subsidy application, approval or review, and received payments in anticipation of or as a result of that intervention, he would not report such "income" on financial disclosure forms, or answer truthfully as to whether he received such payments when interviewed by USDA or U.S. AID investigators.

A finding of relatedness based upon this type of inference is not without precedent in this district. In finding that General Secord's indictment was within the scope of the

Special Division's jurisdictional mandate in *Secord*, Judge Robinson concluded that "[d]efendant's alleged perjury could well be construed as part of a continuing effort to conceal the extent and detail of the "enterprise," " *Secord*, 725 F. Supp. at 566 (emphasis added). If one substitutes the words "falsification of financial statements" for the word "perjury" in the above excerpt, the similarities between *Secord* and the instant case become patently apparent. If Mr. Blackley did, in fact, attempt to intervene in subsidy applications or reviews on behalf of Fuller or Cochran, the alleged falsifications on his financial disclosure form and on the two sworn declarations could logically be part of a "continuing enterprise" to conceal his intervention. That nexus is sufficient to provide the "reasonable causal or logical connection" and the "tenable correlation between events" that is required to support the Independent Counsel's prosecution of these charges.

This court is satisfied that the three 18 U.S.C. § 1001 charges against Ronald Blackley are sufficiently related to the Special Division's jurisdictional grant in the referred matter. Therefore, this court will not grant defendant's motion to dismiss the indictment on the basis that the Independent Counsel has acted in excess of its defined jurisdiction.

B. The Argument That The Prosecution of this Case By the Independent Counsel Circumvents Established Department of Justice Policy.

Under section 594(f)(1) of the Ethics in Government Act, an Independent Counsel:

> shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies

> . . . the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

The rationale underlying the promulgation of this addition to the Independent Counsel statute was to ensure that an Independent Counsel's prosecutorial jurisdiction is subject to some safeguards against overreaching and abuse. "The intent of this change is to create a presumption that the special prosecutor will follow prosecutorial guidelines unless extenuating circumstances exist." Sen. Rep. No. 97-496, at 16 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3552. At the same time, it also alleviates some of the concern that the Independent Counsel law may be unconstitutional because it violates the doctrine of separation of powers. *See Morrison v. Olson*, 487 U.S. 654, 696, 108 S.Ct. 2597, 2621-22, 101 L.Ed.2d 569 (1988) (noting that adherence to Justice Department policies unless not possible to do so does "give the Attorney General [a] means of supervising and controlling the prosecutorial powers that may be wielded by an Independent Counsel").

Defendant contends that his indictment cannot be sustained because it is in contravention of DOJ policy and therefore violates section 594(f)(1). The Department of Justice Manual directs its prosecutors "not to prosecute an EIGA [Ethics in Government Act] violation under section 1001 unless the nondisclosure conceals significant underlying wrongdoing." Department of Justice Manual at 9-85A.304. Mr. Blackley argues that because it is contrary to DOJ policy to bring an 18 U.S.C. § 1001 indictment for a financial non-disclosure in the amount of $22,000, the Independent Counsel is statutorily proscribed from doing so. In other words, defendant contends that section 594(f)(1) gives DOJ prosecutorial policy the force of law when applied to the

Independent Counsel, even though it is conceded that the same policies are merely discretionary when applied to executive branch prosecutors. *See United States v. Poindexter*, 725 F. Supp. 13, 38 (D.D.C. 1989) (citing *United States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir. 1987) (holding that the decision to prosecute a violation of the law cannot be deemed flagrant misconduct, and noting that "The U.S. Attorney's Manual . . . is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.")).

A section 594(f) challenge to an Independent Counsel indictment has been raised in this district at least once before, and rejected. In *United States v. Poindexter*, 725 F. Supp. 13, 38 (D.D.C. 1989), defendant John M. Poindexter sought to have charges dismissed because the indictment was inconsistent with the prosecutorial policies of the Department of Justice. The court found this claim to be without merit, explaining:

> The very nature of the Independent Counsel's responsibilities suggests that it may not always be possible for him to follow those policies, and it is for that very reason that the Independent Counsel statute explicitly provides that he is required to follow Department of Justice policies "only to the extent possible."

Id. (footnotes omitted). *Poindexter* therefore holds that while there is a general presumption that an Independent Counsel should follow the policies and procedures of DOJ, the plain text of section 594(f)(1) indicates that it is not an absolute, lock-step requirement. In some circumstances, it is

expected that the Independent Counsel will depart from the guidelines and seek indictments that would not normally be brought by a United States Attorney.

This court agrees with both the *Poindexter* holding and the logic underlying it as to whether an Independent Counsel is bound by statute to follow established DOJ policy in all cases. It is undeniable that Congress's addition of section 594(f) to the Independent Counsel statute in 1982 created somewhat of a paradox between that provision's purpose and the rationale underlying the overall Independent Counsel framework. On the one hand, through section 594(f)(1), Congress is ensuring that there are not two different standards of justice depending on the prosecutor; that "treatment of officials is equal to that given to ordinary citizens under similar circumstances." Sen. Rep. No. 97-496, at 16 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3552. To prevent against public officials being subject to potentially capricious prosecutorial conduct, an Independent Counsel needs to be tethered to some quantifiable standard, and the Department of Justice policy guidelines provide arguably the most complete, detailed and time-tested standards available. Furthermore, as explained above, adherence to the executive branch's established prosecutorial guidelines helps to guard against constitutional separation-of-powers challenges to the Independent Counsel statute. *See Morrison*, 487 U.S. at 696, 108 S.Ct. at 2621-22.

On the other hand, if an Independent Counsel is supposed to operate as nothing more than the identical twin of the Department of Justice, with no permissible variance in prosecutorial discretion, then the need for the Independent Counsel structure becomes highly questionable. Underlying the Attorney General's decision to proceed under 28 U.S.C. § 592 and invoke the Independent Counsel statute is a presumption that the executive branch is an ineffective

prosecutor of high ranking federal executive officials and national campaign committee officers, and where conflicts of interest may affect the Department of Justice's objective exercise of prosecutorial discretion. *See* 28 U.S.C. §§ 591(b), (c) (describing the persons for whom and situations under which invocation of the Independent Counsel statute is applicable). For the Independent Counsel to play a meaningful role, he or she is necessarily expected to act in a manner different from, and sometimes at odds with, the Department of Justice. As noted in *Poindexter*, "[t]he Independent Counsel, as the very name suggests, is to be independent of the Attorney General." *Poindexter*, 725 F. Supp. at 38.

In recognition of the need to have safeguards against potential abuse while at the same time recognizing the special role of the Independent Counsel, section 594(f) includes the crucial qualifier "to the extent possible" in requiring adherence to DOJ policies. "[T]he Committee does not intend that independent counsels comply with Department policies which would undermine their independence or hinder their mission." Sen. Rep. No. 103-101, at 32 (1993), reprinted in 1994 U.S.C.C.A.N. 748, 777. The question ultimately presented by this challenge to the indictment is whether the charges against Ronald Blackley present a case where adherence to DOJ policies would be inconsistent with the purposes of the Independent Counsel statute, and therefore permissible under section 594(f)(1). The court's answer is in the affirmative, as it is this court's conclusion that these alleged violations of 18 U.S.C. § 1001, which involve either "knowing" or "willful" false statements by Blackley, involve the type of ethically-based offenses which the section 594(f)(1) "to the extent possible" exception anticipates. Therefore, the Independent Counsel may prosecute this case, even if said

prosecution is contrary to the general prosecutorial policies of DOJ.[1]

The Independent Counsel statute was promulgated in the wake of the Watergate scandal, at a time when the nation's confidence in public officials was at an historical nadir. The aspirational goal of the Independent Counsel law was to give the public confidence that crimes committed by government officials would be fully and fairly investigated and prosecuted by an entity with some measure of independence from the individuals he or she must investigate and prosecute. Whenever the Attorney General applies to the Special Division for the appointment of an Independent Counsel, he or she is necessarily addressing a situation in which the integrity of public officials has either been called into question or may soon be called into question. In essence, the Attorney General is charging the Independent Counsel not only with the responsibility of investigating and prosecuting government officers, but also, by implication, with maintaining and/or restoring public trust in government. In this court's view, adherence to an executive branch policy that directs a prosecutor to not pursue indictments against executive branch employees for their criminal ethical violations is in direct contravention with the task with which an Independent Counsel is charged. To statutorily proscribe an Independent Counsel from seeking indictments under ethically oriented statutes is a restriction at odds with the "mission" of an Independent Counsel, namely, to ensure that government officials are being properly investigated and prosecuted for

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[1] Because this court resolves defendant's challenge on the grounds that proscribing this prosecution would be inconsistent with the purposes of the Independent Counsel statute, it will not address the question as to whether this prosecution is, in fact, contrary to the policies of the Department of Justice.

alleged breaches of the public trust. For this reason, to follow the policy of DOJ would be "inconsistent with the purposes of this chapter [the Independent Counsel statute]" and, therefore, departures from the policy are not only permissible, but expected.

While there is no doubt both a reasonable and logical rationale that supports the Department of Justice's policy to not pursue an alleged Ethics in Government Act violation under section 1001 unless that violation "conceals significant underlying wrongdoing," that rationale cannot be applied to the particular task with which an Independent Counsel is charged. Potential criminal ethical violations that may be too small to concern the Department of Justice are nonetheless properly within the purview of the Independent Counsel because the Independent Counsel is, in a sense, charged with the responsibility of ensuring that public officials have maintained the highest standards of ethical conduct. Following an executive branch policy concerning 18 U.S.C. § 1001 could prevent an Independent Counsel from performing the exact task that the executive branch, the Special Division, and by implication, the public, have asked him or her to perform.

Because one of the purposes of the Independent Counsel statute is to maintain public confidence in the conduct of government officials, an Independent Counsel needs to have significant latitude to investigate and prosecute alleged criminal violations that call into question ethical conduct. Mr. Blackley has been charged with three violations of 18 U.S.C. § 1001 for allegedly making knowing or willful false statements. As these charges raise questions concerning Mr. Blackley's ethical conduct, these prosecutions, for the reasons stated above, are properly pursued by the Independent Counsel. Therefore, this court holds that, even if bringing these charges against Ronald Henderson Blackley is inconsistent with written and established DOJ policy (an issue

this court declines to address, *See* FN 1), the indictment nonetheless does not violate section 594(f) because the charges fall under the "inconsistent with the purposes of this chapter" exception to the requirement that the Independent Counsel follow DOJ prosecutorial policies. This court will therefore not grant defendant's motion to dismiss on the basis that the prosecution of this case circumvents established DOJ policy and is therefore prohibited under section 594(f)(1).

C. Did the Special Division have the Power to Refer This Matter to the Independent Counsel?

Defendant's original Motion to Dismiss the Indictment alleges that the Special Division exceeded its constitutional powers when it referred a related matter under section 594(e) over the express objection of the Attorney General. That motion asserts that the exercise of prosecutorial jurisdiction by the Independent Counsel that is not pursuant to a specific request by the Attorney General violates Article II, Article III, and *Morrison v. Olson*. Notably, defendant's Supplemental Memorandum largely abandons this challenge to the validity of the indictment.[2]

To properly address this argument, this court would have to determine whether the modification of the jurisdictional mandate should have been done under the referral power of section 594(e) (which does not require a request by the attorney general) or the expansion power of § 593(c)(2) (which does), and whether this particular section 594(e) referral was unconstitutional because it permitted the creation of prosecutorial jurisdiction over the express objection of the

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[2] Defendant's original counsel, who filed the initial Motion to Dismiss, was disqualified. *See United States v. Blackley*, --- F.Supp. ---- (D.D.C. August 22, 1997). The supplemental memorandum was filed by new counsel, who entered their appearance on September 22, 1997.

Attorney General, arguably infringing upon the executive branch's exclusive power to enforce the laws of the United States.

However, this court is not jurisdictionally situated such that it may consider these claims as these issues were considered, analyzed and definitively answered in *In re Espy*, 80 F.3d 501 (D.C.Cir. 1996). Congress designated the Special Division a "division of the United States Court of Appeals for the District of Columbia Circuit." 28 U.S.C. § 49. For this court to review the constitutionality of the referral jurisdiction granted *In re Espy* would require it to sit in an appellate capacity over the D.C. Circuit, which it cannot and will not do. If the Special Division concluded that "the new matter is demonstrably related to the factual circumstances that gave rise to the Attorney General's initial investigation and request for appointment of an independent counsel," *In re Espy*, 80 F.3d at 509, this court is not empowered to disturb those findings. Nor may this court substitute its own constitutional analysis of § 594(e) and conclude that the concurrence of the Attorney General is required before the Special Division can refer related matters. The Espy court determined that under the Act the court can refer a related matter to an Independent Counsel under section 594(e) without the concurrence of the Attorney General. *Id.* at 504-06. To the extent defendant is challenging the jurisdiction of the Independent Counsel based upon arguments already asserted by DOJ and resolved by the Special Division, defendant's motion to dismiss cannot be granted.

A separate order shall issue this day.

ORDER

This matter comes before the court on defendant's Motion to Dismiss Indictment of Ronald Henderson Blackley pursuant to Fed.R.Crim.Proc. 12(b). Upon consideration of the motions and oppositions thereto, the oral arguments of both parties, and for the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that defendant's Motion to Dismiss Indictment is DENIED.

SO ORDERED.

APPENDIX C

March 18, 1998 Judgment in a Criminal Case (verdict of guilty on three counts of false statements, 18 U.S.C. § 1001, and sentence of 27 months imprisonment and three years supervised release)

UNITED STATES DISTRICT COURT
for the District of Columbia

Case Number CR97-166

UNITED STATES OF AMERICA

v.

RONALD HENDERSON BLACKLEY

Defendant.

FILED MAR 19 1998
NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RONALD HENDERSON BLACKLEY was represented by SHELDON KRANTZ, BARBARA ROWLAND & ELIZABETH DEWEY.

The defendant was found guilty on count(s) 1, 2, & 3 by a jury verdict on 12/1/97 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	18 USC 1001
Nature of Offense	FALSE STATEMENTS
Date of Offense	JUNE 28, 1994 & AUGUST 15, 1996
Count Number(s)	1, 2, & 3

As pronounced on MARCH 18, 1998, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The mandatory special assessment is included in the portion of this Judgment that imposes the Criminal Monetary Penalties.

It is further ordered that the defendant shall notify the United States Attorney and the Clerk's Office for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this the 18th day of MARCH, 1998.

/s/ Royce C. Lamberth
ROYCE C. LAMBERTH
United States District Judge

United States District Court for the District of Columbia
A TRUE COPY
NANCY MAYER-WHITTINGTON, Clerk
By /s/ Ellen M. Herbert
Deputy Clerk

Defendant: RONALD HENDERSON BLACKLEY
Case Number: CR97-166

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 27 months on each of Counts 1, 2, and 3. All counts are to run concurrently.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons when notified to report by the United States Marshal, Probation Office or Pretrial Services Office when directed to do so.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each count to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance.

The mandatory drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by the probation office of this court set forth on the next page. The defendant shall also comply with the following special conditions:

The defendant shall not possess a firearm or other dangerous weapon for any reason.

The defendant shall not seek nor shall he obtain employment with the U.S. Government during his supervised release term.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any person engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth below under SCHEDULE OF PAYMENTS heading.

Count	Assessment	Fine	Restitution
1	$50.00	$0.00	$0.00
2	$50.00	$0.00	$0.00
3	$100.00	$0.00	$0.00
TOTALS:	$200.00	$0.00	$0.00

Account Number for Restitution:

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and/or other criminal monetary penalties shall be due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments except those payments made through the Bureau of Prisons' Inmate Responsibility Program are to be made as directed by the court, the probation officer, or the United States Attorney.

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary): upward departure of 8 levels for reasons stated in open court.

Guideline Range Determined by the Court:

Total Offense Level: 16

Criminal History Category: I

Imprisonment Range: 21 to 27 months

Supervised Release Range: 2 to 3 years

Fine Range: $5,000 to $50,000

☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay

Total Amount of Restitution: $

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any

amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs form the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term 1998
97cr00166-01

No. 98-3036

United States of America,
Appellee

v.

Ronald Henderson Blackley.
Appellant

FILED MAR 31 1999

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's Petition for Rehearing *En Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition is denied.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Circuit Judges Sentelle and Garland did not participate in this matter.

APPENDIX E

ETHICS IN GOVERNMENT ACT
28 U.S.C. §§ 591-599

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART II--DEPARTMENT OF JUSTICE
CHAPTER 40--INDEPENDENT COUNSEL

§ 591. Applicability of provisions of this chapter

(a) Preliminary investigation with respect to certain covered persons.--The Attorney General shall conduct a preliminary investigation in accordance with section 592 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(b) Persons to whom subsection (a) applies.--The persons referred to in subsection (a) are --

(1) the President and Vice President;

(2) any individual serving in a position listed in section 5312 of title 5;

(3) any individual working in the Executive Office of the President who is compensated at a rate of pay at or above level II of the Executive Schedule under section 5313 of title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice who is compensated at a rate of pay at or above level III of the Executive Schedule under section 5314 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of that committee exercising authority at the national level, during the incumbency of the President; and

(7) any individual who held an office or position described in paragraph (1), (2), (3), (4), or (5) for 1 year after leaving the office or position.

[(8) Redesignated (6)]

(c) Preliminary investigation with respect to other persons.--

(1) In general.--When the Attorney General determines that an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest, the Attorney General may conduct a preliminary investigation of such person in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether that person may have violated Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(2) Members of Congress.--When the Attorney General determines that it would be in the public interest, the Attorney General may conduct a preliminary investigation in accordance with section 592 if the Attorney General receives information sufficient to constitute grounds to investigate whether a Member of Congress may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction.

(d) Examination of information to determine need for preliminary investigation.--

(1) Factors to be considered.--In determining under subsection (a) or (c) (or section 592(c)(2)) whether grounds to investigate exist, the Attorney General shall consider only--

(A) the specificity of the information received; and

(B) the credibility of the source of the information.

(2) Time period for making determination.--The Attorney General shall determine whether grounds to investigate exist not later than 30 days after the information is first received. If within that 30-day period the Attorney General determines that the information is not specific or is not from a credible source, then the Attorney General shall close the matter. If within that 30-day period the Attorney General determines that the information is specific and from a credible source, the Attorney General shall, upon making that determination, commence a preliminary investigation with respect to that information. If the Attorney General is unable to determine, within that 30-day period, whether the information is specific and from a credible source, the Attorney General shall, at the end of that 30-day period, commence a preliminary investigation with respect to that information.

(e) Recusal of Attorney General.--

(1) When recusal is required.--(A) If information received under this chapter involves the Attorney General, the next most senior official in the Department

of Justice who is not also recused shall perform the duties assigned under this chapter to the Attorney General.

(B) If information received under this chapter involves a person with whom the Attorney General has a personal or financial relationship, the Attorney General shall recuse himself or herself by designating the next most senior official in the Department of Justice who is not also recused to perform the duties assigned under this chapter to the Attorney General.

(2) Requirements for recusal determination.--Before personally making any other determination under this chapter with respect to information received under this chapter, the Attorney General shall determine under paragraph (1)(B) whether recusal is necessary. The Attorney General shall set forth this determination in writing, identify the facts considered by the Attorney General, and set forth the reasons for the recusal. The Attorney General shall file this determination with any notification or application submitted to the division of the court under this chapter with respect to such information.

Amendments

1994 Amendments. Subsec. (b)(6). Pub.L. 103-270, § 4(b)(1), (2), redesignated former par. (8) as (6) and struck out former par. (6) which read as follows:

"(6) any individual who leaves any office or position described in any of paragraphs (1) through (5) of this subsection, during the incumbency of the President under whom such individual served in the office or position plus one year after such incumbency, but in no event longer than a period of three years after the individual leaves the office or position;".

Subsec. (b)(7). Pub.L. 103-270, § 4(b)(1), (3), added par. (7) and struck out former par. (7) which read as follows:

"(7) any individual who held an office or position described in any of paragraphs (1) through (5) of this subsection during the incumbency of one President and who continued to hold the office or position for not more than 90 days into the term of the next President, during the 1-year period after the individual leaves the office or position; and".

Subsec. (b)(8). Pub.L. 103-270, § 4(b)(2), redesignated former par. (8) as (6).

Subsec. (c) Pub.L. 103-270, § 4(a), redesignated existing opening cl. and pars. (1) and (2) as par. (1) and added heading, and added par. (2).

Subsec. (d)(2). Pub.L. 103-270, § 3(j), substituted "30" for "15"wherever appearing.

Subsec. (e). Pub.L. 103-270, § 3(k), in par. (1) designated existing text as subpars. (A) and (B), in subpar. (A) as so designated, substituted provision directing that next most senior official who is not recused shall perform Attorney General's duties, for provision directing that Attorney General shall recuse himself by designating the next most senior officer to perform duties, in subpar. (B) as so designated substituted reference to personal or financial relationship for reference to current or recent personal or financial relationship, and in par. (2) substituted reference to par. (1)(B) for reference to par. (1).

1987 Amendments. Subsec. (a). Pub.L. 100-191 added a subsection heading and, in text, substituted a reference to "a preliminary investigation in accordance with section 592" for a former reference to "an investigation pursuant to the provisions of this chapter" and substituted "may have violated any Federal criminal law other than a violation classified as"

for "has committed a violation of any Federal criminal law other than a violation constituting".

Subsec. (b). Pub.L. 100-191 added a subsection heading and, in text, re-enacted pars. (1)-(5) substantially without change, in par. (6) substituted a three-year period after the individual leaves the office or position as the maximum covered period for a former covered period of two years after the individual left office, in par. (7) substituted a reference to a person holding an office during the incumbency of one President who continues to hold the office or position for not more than 90 days into the term of the next President, during the 1-year period after the individual leaves the office or position, for former reference to a person who continued to hold office for not more than 90 days into the term of the next President during the period such person served plus one year after such person left the office, and, in par. (8) deleted language giving the campaign manager or director as examples of a campaign officer exercising authority at the national level.

Subsec. (c). Pub.L. 100-191 added a subsection heading and, in text, substituted provisions authorizing the Attorney General to conduct a preliminary investigation in accordance with section 592 if (1) the Attorney General receives information sufficient to constitute grounds to investigate whether any person other than a person described in subsection (b) may have violated any Federal criminal law other than a violation classified as a Class B or C misdemeanor or an infraction; and (2) the Attorney General determines that an investigation or prosecution of the person, with respect to the information received, by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest, for former provisions which had directed that whenever the Attorney General received information sufficient to constitute

grounds to investigate that any person not described in subsection (b) of this section had committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General could conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determined that investigation of such person by the Attorney General or other officer of the Department of Justice might result in a personal, financial, or political conflict of interest.

Subsecs. (d), (e). Pub.L. 100-191 added subsecs. (d) and (e).

1984 Amendments. Subsec. (a). Pub.L. 98-473 substituted "Class B or C misdemeanor or an infraction" for "petty offense".

1983 Amendments. Subsec. (a). Pub.L. 97-409, § 4(a)(1), substituted "information sufficient to constitute grounds to investigate" for "specific information" after "the Attorney General receives".

Subsec. (b)(3). Pub.L. 97-409, § 3, substituted "who is compensated at or above a rate equivalent to level II" for "and compensated at a rate not less than the annual rate of basic pay provided for level IV".

Subsec. (b)(4), (5). Pub.L. 97-409, § 3, redesignated as par. (5) "the Director of Central Intelligence" and all that followed through end of par. (4). Former par. (5) redesignated (6).

Subsec. (b)(6). Pub.L. 97-409, § 3, redesignated former par. (5) as (6) and substituted "through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;" for "through (4) of this subsection

during the incumbency of the President or during the period the last preceding President held office, if such preceding President was of the same political party as the incumbent President; and". Former par. (6) redesignated (8).

Subsec. (b)(7). Pub.L. 97-409, § 3, added par. (7).

Subsec. (b)(8). Pub.L. 97-409, § 3, redesignated former par. (6) as (8) and substituted "the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President" for "any officer of the principal national campaign committee seeking the election or reelection of the President".

Subsec. (c). Pub.L. 97-409, § 4(a)(2), added subsec. (c).

Effective Dates

1994 Acts. Section 7 of Pub.L. 103-270 provided that:

"(a) In general.--Except as provided in this section, the amendments made by this Act [amending this section and sections 592 through 596 and 599 of this title and enacting provisions set out as notes under this section and section 113 of Title 3, The President] shall apply with respect to independent counsels appointed before, on, or after the date of enactment of this Act [June 30, 1994].

"(b) Assignment of employee to certify expenditures.--An independent counsel appointed prior to the date of enactment of this Act [June 30, 1994] shall assign to an employee the duty of certifying expenditures, as required by section 594(l) of title 28, United States Code, as added by section 3(a) [section 594(l) of this title], by the date that is 30 days after the date of enactment of this Act.

"(c) Office space.--The Administrator of General Services, in applying section 594(l)(3) of title 28, United States Code, as added by section 3(a) [section 594(l)(3) of this title], to determine whether the office of an independent counsel appointed prior to the date of enactment of this Act [June 30, 1994] should be moved to a Federal building, shall take into account the moving, legal, and other expenses that might arise if the office were moved.

"(d) Travel and subsistence expenses.--For purposes of the restrictions on reimbursement of travel and subsistence expenses of an independent counsel and employees of an office of independent counsel contained in paragraph (3) of section 594(b) of title 28, United States Code, as amended by section 3(b) [section 594(b)(3) of this title], as applied to the office of an independent counsel appointed before the date of enactment of this Act [June 30, 1994], the 1-year service period shall begin on the date of enactment of this Act.

"(e) Rates of compensation.--The limitation on rates of compensation of employees of an office of independent counsel contained in the last sentence of section 594(c) of title 28, United States Code, as amended by section 3(c) [section 594(c) of this title], shall not be applied to cause a reduction in the rate of compensation of an employee appointed before the date of enactment of this Act [June 30, 1994].

"(f) Periodic reappointment.--The determinations by the division of the court contained in the last sentence of section 596(b)(2) of title 28, United States Code, as amended by section 3(h) [section 596(b)(2) of this title], shall, for the office of an independent counsel appointed before the date of enactment of this Act [June 30, 1994], be required no later than 1 year after the date of enactment of this Act and at the end of each succeeding 1-year period.

"(g) Reporting requirements.--No amendment made by this Act [amending this section and sections 592 through 596 and 599 of this title and enacting provisions set out as notes under this section and section 113 of Title 3] that establishes or modifies a requirement that any person submit a report to any other person with respect to an activity occurring during any time period shall be construed to require that a report submitted prior to the date of enactment of this Act [June 30, 1994], with respect to that time period be supplemented to include information with respect to such activity.

"(h) Regulatory independent counsel.--Notwithstanding the restriction in section 593(b)(2) of title 28, United States Code [section 593(b)(2) of this title], the division of the court described in section 49 of that title [section 49 of this title] may appoint as an independent counsel any individual who, on the date of enactment of this Act [June 30, 1994], is serving as a regulatory independent counsel under parts 600 and 603 of title 28, Code of Federal Regulations. If such an individual is so appointed, such an independent counsel shall comply with chapter 40 of title 28, United States Code, as amended by this Act [this chapter], in the same manner and to the same extent as an independent counsel appointed before the date of enactment of this Act is required to comply with that chapter, except that subsection (f) of this section shall not apply to such an independent counsel.

"(i) White House personnel report.--Section 6 [enacting provisions set out as a note under section 113 of Title 3] shall take effect on January 1, 1995."

1987 Acts. Section 6 of Pub.L. 100-191 provided that:

"(a) In general.-- Subject to subsection (b), the amendments made by this Act [enacting section 599 of this title, amending sections 49 and 591 to 598 of this title, sections 203 and 205 of Pub.L. 95-521 set out in Appendix 4

to Title 5, Government Organization and Employees, and section 202 of Title 18, Crimes and Criminal Procedure, enacting provisions set out as a note under section 1 of this title, and amending provisions set out as a note under this section] take effect on the date of the enactment of this Act [Dec. 15, 1987].

"(b) Pending proceedings.-- With respect to any proceeding under chapter 39 of title 28, United States Code (before the redesignation of such chapter as chapter 40 by section 144(g) of Public Law 99-554) [this chapter], or under chapter 40 of such title (after such redesignation) [this chapter], which is pending on the date of the enactment of this Act [Dec. 15, 1987], the following shall apply:

"(1) Except as provided in paragraphs (2) and (3), the provisions of chapter 40 of such title [this chapter] as in effect on the day before such date of enactment [Dec. 15, 1987] shall, in lieu of the amendments made by this Act, continue to apply on or after such date to such proceeding until such proceeding is terminated in accordance with such chapter.

"(2) The following provisions shall apply to such proceeding on or after such date of enactment:

"(A) Section 593(f) of title 28, United States Code, as amended by section 2 of this Act [section 593(f) of this title] relating to the award of attorneys' fees.

"(B) Section 594(d)(2) of such title, as added by section 2 of this Act [section 594(d)(2) of this title], to the extent that such section 594(d)(2) relates to reports by the Attorney General on expenditures by independent counsel, except that the first such report shall be made only with respect to expenditures on or

after the date of the enactment of this Act [Dec. 15, 1987].

"(C) Section 594(h)(1)(A) of such title, as added by section 2 of this Act [section 594(h)(1)(A) of this title], relating to reports by independent counsel, except that the 6-month periods described in such section 594(h)(1)(A) shall be calculated from the date of the enactment of this Act [Dec. 15, 1987].

"(D) Section 594(i) of such title, as added by section 2 of this Act [section 594(i) of this title], relating to the independence of the office of independent counsel for certain purposes.

"(E) Section 594(k) of such title, as added by section 2 of this Act [section 594(u) of this title], relating to custody of records of independent counsel.

"(F) Section 596(a)(3) of such title, as amended by section 2 of this Act [section 596(a)(3) of this title], relating to judicial review of the removal of an independent counsel from office.

"(G) Section 596(c) of such title, as added by section 2 of this Act [section 596(c) of this title], relating to audits of expenditures of independent counsel.

"(H) The amendments made by section 3 of this Act [amending section 202(a) of Title 18, Crimes and Criminal Procedure, and sections 203 and 205 of Pub.L. 95-521, set out in Appendix 4 to Title 5, Government Organization and Employees], relating to the status of independent counsel and their appointees as special government employees and to their financial disclosure requirements.

"(3) Section 594(j) of title 28, United States Code, as added by section 2 of this Act [section 594(j) of this title], relating to certain standards of conduct shall, 90 days after the date of the enactment of this Act [Dec. 15, 1987], apply to a pending proceeding described in this subsection."

1984 Acts. Section 235(a)(1)(B)(ii)(IV) of Pub.L. 98-473 had provided that the amendment made by section 228 of Pub.L. 98-473 was to be effective Oct. 12, 1984. Pub.L. 99-646, § 35(2)(D), Nov. 10, 1986, 100 Stat. 3599, amended section 235(a)(1)(B)(ii)(IV) of Pub.L. 98-473 making it inapplicable to section 228. Amendment by Pub.L. 98-473 effective the first day of the first calendar month beginning 36 months after Oct. 12, 1984, *see* section 235(a)(1) of Pub.L. 98-473, as amended, set out as a note under section 3551 of Title 18, Crimes and Criminal Procedure.

1978 Acts. Section 604 of Pub.L. 95-521 provided that: "Except as provided in this section, the amendments made by this title [enacting this chapter and sections 49, 528, and 529 of this title] shall take effect on the date of the enactment of this Act [Oct. 26, 1978]. The provisions of chapter 39 of title 28 of the United States Code, as added by section 601 of this Act, shall not apply to specific information received by the Attorney General pursuant to section 591 of such title 28, if the Attorney General determines that--

"(1) such specific information is directly related to a prosecution pending at the time such specific information is received by the Attorney General;

"(2) such specific information is related to a matter which has been presented to a grand jury and is received by the Attorney General within one hundred and eighty days of the date of the enactment of this Act [Oct. 26, 1978]; or

"(3) such specific information is related to an investigation that is pending at the time such specific information is received by the Attorney General, and such specific information is received by the Attorney General within ninety days of the date of the enactment of this Act [Oct. 26, 1978]."

Contingency Fund for Independent Counsels

Section 601(c) of Pub.L. 95-521, as amended Pub.L. 97-409, § 2(c)(2), Jan. 3, 1983, 96 Stat. 2039; Pub.L. 100-191, § 5(b), Dec. 15, 1987, 101 Stat. 1307, provided that: "There are authorized to be appropriated for each fiscal year such sums as may be necessary, to be held by the Department of Justice as a contingent fund for the use of any independent counsels appointed under chapter 40 (relating to independent counsel) of title 28 of the United States Code [this chapter] in the carrying out of functions under such chapter."

Permanent Appropriation for Expenses of Independent Counsels

Pub.L. 100-202, § 101(a) [Title II], Dec. 22, 1987, 101 Stat. 1329-9, provided in part "That a permanent indefinite appropriation is established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. 591 *et seq.* [this chapter] or other law: Provided further, That the Comptroller General shall perform semiannual financial reviews of expenditures from the Independent Counsel permanent indefinite appropriation, and report their findings to the Committees on Appropriations of the House and Senate".

§ 592. Preliminary investigation and application for appointment of an independent counsel

(a) Conduct of preliminary investigation.--

(1) In general.--A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that, in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement.

(2) Limited authority of Attorney General.--(A) In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(i) The Attorney General shall not base a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person lacked the state of mind required for the violation of criminal law.

(ii) The Attorney General shall not base a determination under this chapter that there are no

reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

(3) Extension of time for preliminary investigation.--The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

(b) Determination that further investigation not warranted.--

(1) Notification of division of the court.--If the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

(2) Form of notification.--Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

(c) Determination that further investigation is warranted.--

(1) Application for appointment of independent counsel.--The Attorney General shall apply to the division of the court for the appointment of an independent counsel if--

(A) the Attorney General, upon completion of a preliminary investigation under this chapter,

determines that there are reasonable grounds to believe that further investigation is warranted; or

(B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1).

In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

(2) Receipt of additional information.--If, after submitting a notification under subsection (b)(1), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall--

(A) conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date on which such additional information is received; and

(B) otherwise comply with the provisions of this section with respect to such additional preliminary investigation to the same extent as any other preliminary investigation under this section.

(d) Contents of application.--Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in

defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.

(e) Disclosure of information.--Except as otherwise provided in this chapter or as is deemed necessary for law enforcement purposes, no officer or employee of the Department of Justice or an office of independent counsel may, without leave of the division of the court, disclose to any individual outside the Department of Justice or such office any notification, application, or any other document, materials, or memorandum supplied to the division of the court under this chapter. Nothing in this chapter shall be construed as authorizing the withholding of information from the Congress.

(f) Limitation on judicial review.--The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

(g) Congressional request.--

(1) By Judiciary Committee or members thereof.--The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel.

(2) Report by Attorney General pursuant to request.--Not later than 30 days after the receipt of a request under paragraph (1), the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request

serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made, in accordance with subsection (a) or (c) of section 591, as the case may be. The report shall set forth the reasons for the Attorney General's decision regarding such preliminary investigation as it relates to each of the matters with respect to which the congressional request is made. If there is such a preliminary investigation, the report shall include the date on which the preliminary investigation began or will begin.

(3) Submission of information in response to congressional request.--At the same time as any notification, application, or any other document, material, or memorandum is supplied to the division of the court pursuant to this section with respect to a preliminary investigation of any matter with respect to which a request is made under paragraph (1), such notification, application, or other document, material, or memorandum shall be supplied to the committee making the request, or to the committee on which the persons making the request serve. If no application for the appointment of an independent counsel is made to the division of the court under this section pursuant to such a preliminary investigation, the Attorney General shall submit a report to that committee stating the reasons why such application was not made, addressing each matter with respect to which the congressional request was made.

(4) Disclosure of information.--Any report, notification, application, or other document, material, or memorandum supplied to a committee under this subsection shall not be revealed to any third party, except that the committee may, either on its own initiative or

upon the request of the Attorney General, make public such portion or portions of such report, notification, application, document, material, or memorandum as will not in the committee's judgment prejudice the rights of any individual.

Amendments

1994 Amendments. Subsec. (e). Pub.L. 103-270, § 3(l), inserted "or as is deemed necessary for law enforcement purposes" after "Except as otherwise provided in this chapter".

1987 Amendments. Catchline. Pub.L. 100-191 substituted "Preliminary investigation and application for appointment of an independent counsel" for "Application for appointment of a independent counsel".

Subsec. (a). Pub.L. 100-191 added subsec. (a) heading.

Subsec. (a)(1). Pub.L. 100-191 added par. (1) heading and, in text, substituted provisions directing that a preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law, that the Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received, and that the Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement, for provisions which had directed that, upon receiving information that the Attorney General

determined was sufficient to constitute grounds to investigate that any person covered by the Act had engaged in conduct described in subsection (a) or (c) of section 591 of this title (such determination based upon stated factors), the Attorney General had to conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deemed appropriate.

Subsec. (a)(2). Pub.L. 100-191 added par. (2) heading.

Subsec. (a)(2)(A). Pub.L. 100-191 designated the existing provisions of subsec. (a)(2) as subpar. (A) and, in subpar. (A) as so designated, substituted "preliminary investigations under this chapter" for "preliminary investigations pursuant to this section" and "subpoenas" for "subpenas".

Subsec. (a)(2)(B). Pub.L. 100-191 added subpar. (B).

Subsec. (a)(3). Pub.L. 100-191 added par. (3).

Subsec. (b). Pub.L. 100-191 added headings for subsec. (b) and pars. (1) and (2), re-enacted the text of subsec. (b)(1) and (2) substantially without change, and struck out former par. (3), prohibiting the revelation of memoranda to outside individuals without leave of the division of the court.

Subsec. (c). Pub.L. 100-191 added headings for subsec. (c) and for each of pars. (1) and (2) and re-enacted the text of subsec. (c)(1) and (2) substantially without change.

Subsec. (d). Pub.L. 100-191 added subsec. (d) heading, struck out the par. "(1)" designation preceding "Any application", re-enacted the text of former par. (1) substantially without change, and struck out former par. (2) relating to the prohibition upon the revelation of information to outside individuals without leave of the division of the court.

Subsec. (e). Pub.L. 100-191 added subsec. (e) heading and, in text, substituted provisions prohibiting the revelation of documents, materials, and memoranda to outside individuals without leave of the court (with exception relating to congress), for provisions relating to the referral to independent counsel by the Attorney General of matters within the independent counsel's prosecutorial jurisdiction.

Subsec. (f). Pub.L. 100-191 added subsec. (f) heading and re-enacted the text substantially without change.

Subsec. (g). Pub.L. 100-191 added subsec. (g).

1983 Amendments. Subsec. (a). Pub.L. 97-409, § 4(b), substituted direction, designated par. (1), that upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate, and that in determining whether grounds to investigate exist, the Attorney General shall consider the degree of specificity of the information received and the credibility of the source of the information for provision that the Attorney General, upon receiving specific information that any of the persons described in section 591(b) of this title had engaged in conduct described in section 591(a) of this title, was to conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deemed appropriate, and added par. (2).

Subsec. (b)(1). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Pub.L. 97-409, § 4(c), substituted "that there are no reasonable grounds to believe that further investigation or prosecution is warranted" for "that the matter is so unsubstantiated that no further investigation or prosecution is warranted".

Subsec. (c)(1). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Pub.L. 97-409, § 4(d), substituted "finds reasonable grounds to believe that further investigation or prosecution is warranted" for "finds the matter warrants further investigation or prosecution" after "preliminary investigation,", and "that there are no reasonable grounds to believe that further investigation or prosecution is warranted" for "that the matter is so unsubstantiated as not to warrant further investigation or prosecution", and added provision that in determining whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

Subsec. (c)(2). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" in the provisions following subpar. (B).

Subsec. (c)(2)(A). Pub.L. 97-409, § 4(e)(1), substituted "information sufficient to constitute grounds to investigate" for "specific information" after "receives additional".

Subsec. (c)(2)(B). Pub.L. 97-409, § 4(e)(2), substituted "reasonable grounds exist to warrant" for "such information warrants" after "appropriate, that".

Subsecs. (d)(1), (e). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Pub.L. 97-409, § 2(a)(1)(B), substituted "independent counsel's" for "special prosecutor's" wherever appearing.

Subsec. (f). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Effective Dates

1994 Acts. Amendment by Pub.L. 103-270 applicable with respect to independent counsels appointed before, on, or after June 30, 1994, *see* section 7(a) of Pub.L. 103-270, set out as a note under section 591 of this title.

1987 Acts. Amendment by Pub.L. 100-191 to take effect on Dec. 15, 1987, and to apply only to new independent counsel proceedings and to new independent counsels coming into existence on and after Dec. 15, 1987, *see* section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, *see* section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

§ 593. Duties of the division of the court

(a) Reference to division of the court.--The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) Appointment and jurisdiction of independent counsel.--

(1) Authority.--Upon receipt of an application under section 592(c), the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.

(2) Qualifications of independent counsel.--The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

(3) Scope of prosecutorial jurisdiction.--In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

(4) Disclosure of identity and prosecutorial jurisdiction.--An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel

would be in the best interests of justice. In any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the independent counsel's investigation.

(c) Expansion of jurisdiction.--

(1) In general.--The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appointment of another independent counsel.

(2) Procedure for request by independent counsel.--(A) If the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determinations required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.

(B) If the Attorney General determines, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent

counsel or to appoint another independent counsel with respect to the matters involved.

(C) If--

(i) the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted; or

(ii) the 30-day period referred to in subparagraph (A) elapses without a notification to the division of the court that no further investigation is warranted, the division of the court shall expand the jurisdiction of the appropriate independent counsel to include the matters involved or shall appoint another independent counsel to investigate such matters.

(d) Return for further explanation.--Upon receipt of a notification under section 592 or subsection (c)(2)(B) of this section from the Attorney General that there are no reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter, the division of the court shall have no authority to overrule this determination but may return the matter to the Attorney General for further explanation of the reasons for such determination.

(e) Vacancies.--If a vacancy in office arises by reason of the resignation, death, or removal of an independent counsel, the division of the court shall appoint an independent counsel to complete the work of the independent counsel whose resignation, death, or removal caused the vacancy, except that in the case of a vacancy arising by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed.

(f) Attorneys' fees.--

(1) Award of fees.--Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the the[1] independent counsel who conducted the investigation and Attorney General of any request for attorneys' fees under this subsection.

(2) Evaluation of fees.--The division of the court shall direct such independent counsel and the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, addressing--

(A) the sufficiency of the documentation;

(B) the need or justification for the underlying item;

(C) whether the underlying item would have been incurred but for the requirements of this chapter; and

(D) the reasonableness of the amount of money requested.

(g) Disclosure of information.--The division of the court may, subject to section 594(h)(2), allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of the court under this chapter.

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[1] So in original.

(h) Amicus curiae briefs.--When presented with significant legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely amicus curiae briefs.

Amendments

1994 Amendments. Subsec. (f)(1). Pub.L. 103-270, § 3(n)(1), inserted "the independent counsel who conducted the investigation and" before "Attorney General".

Subsec. (f)(2). Pub.L. 103-270, § 3(n)(2), in opening subpar. substituted "addressing--" for "analyzing for each expense--", added subpar. (C), and redesignated former subpar. (C) as (D).

1987 Amendments. Catchline. Pub.L. 100-191 re-enacted the section heading without change.

Subsec. (a). Pub.L. 100-191 added subsec. (a) heading and re-enacted the text without change.

Subsec. (b). Pub.L. 100-191 added subsec. (b) heading, designated existing provisions as pars. (1) and (4) and in pars. (1) and (4), as so designated, added par. headings and re-enacted such provisions substantially without change, and added pars. (2) and (3).

Subsec. (c). Pub.L. 100-191 added subsec. (c) heading.

Subsec. (c)(1). Pub.L. 100-191 designated existing provisions as par. (1), added a par. (1) heading, and re-enacted such provisions substantially without change.

Subsec. (c)(2). Pub.L. 100-191 added par. (2).

Subsec. (d). Pub.L. 100-191 added subsec. (d) heading, and substituted provisions authorizing the court to return the matter to the Attorney General for further explanation when the Attorney General notifies the court that there are no

reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter for former provisions which had directed that the court could not appoint as an independent counsel any person who recently held any office of profit or trust under the United States.

Subsec. (e). Pub.L. 100-191 added subsec. (e) heading and re-enacted existing text substantially without change.

Subsec. (f)(1). Pub.L. 100-191 added subsec. and par. headings, and substituted provisions relating to attorneys' fees for provisions authorizing the granting of an extension of 60 days in the preliminary investigation.

Subsec. (f)(2). Pub.L. 100-191 added par. (2).

Subsec. (g). Pub.L. 100-191 added subsec. heading, and substituted provisions relating to the disclosure of information for provisions relating to attorneys' fees.

Subsec. (h). Pub.L. 100-191 added subsec. (h)

1983 Amendments. Subsec. (b). Pub.L. 97-409, § 2(a)(1), substituted "independent counsel" for "special prosecutor" and "independent counsel's" for "special prosecutor's" wherever appearing.

Subsecs. (c) to (e). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Subsecs. (f), (g). Pub.L. 97-409, § 5, added subsecs. (f) and (g).

Effective Dates

1994 Acts. Amendment by Pub.L. 103-270 applicable with respect to independent counsels appointed before, on, or after June 30, 1994, with provisions directing that

noamendment made by Pub.L. 103-270 establishing or modifying a reporting requirement shall be construed to require that a report submitted prior to June 30, 1994 be supplemented to include information with respect to activity occurring during any time period, and that the division of the court described in section 49 of this title is authorized to appoint as an independent counsel any individual who, on June 30, 1994, is serving as a regulatory independent counsel under parts 600 and 603 of title 28, Code of Federal Regulations, notwithstanding the restriction in subsec. (b)(2) of this section, *see* section 7(a), (g), (h) of Pub.L. 103-270, set out as a note under section 591 of this title.

1987 Acts. Amendment by Pub.L. 100-191 to take effect on Dec. 15, 1987, and to apply only to new independent counsel proceedings and to new independent counsels coming into existence on and after Dec. 15, 1987, but with subsec. (f) applicable to previously initiated proceedings still pending on Dec. 15, 1987, *see* section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, *see* section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

§ 594. Authority and duties of an independent counsel

(a) Authorities.--Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include--

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and

(10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

(b) Compensation.--

(1) In general.--An independent counsel appointed under this chapter shall receive compensation at the per diem rate equal to the annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5.

(2) Travel expenses.--Except as provided in paragraph (3), an independent counsel and persons appointed under subsection (c) shall be entitled to the payment of travel expenses as provided by subchapter I

of chapter 57 of title 5, United States Code, including travel, per diem, and subsistence expenses in accordance with section 5703 of title 5.

(3) Travel to primary office.--

(A) In general.--After 1 year of service under this chapter, an independent counsel and persons appointed under subsection (c) shall not be entitled to the payment of travel, per diem, or subsistence expenses under subchapter I of chapter 57 of title 5, United States Code, for the purpose of commuting to or from the city in which the primary office of the independent counsel or person is located. The 1-year period may be extended for successive 6-month periods if the independent counsel and the division of the court certify that the payment is in the public interest to carry out the purposes of this chapter.

(B) Relevant factors.--In making any certification under this paragraph with respect to travel and subsistence expenses of an independent counsel or person appointed under subsection (c), such employee shall consider, among other relevant factors--

(i) the cost to the Government of reimbursing such travel and subsistence expenses;

(ii) the period of time for which the independent counsel anticipates that the activities of the independent counsel or person, as the case may be, will continue;

(iii) the personal and financial burdens on the independent counsel or person, as the case may be, of relocating so that such travel and

subsistence expenses would not be incurred; and

(iv) the burdens associated with appointing a new independent counsel, or appointing another person under subsection (c), to replace the individual involved who is unable or unwilling to so relocate.

(c) Additional personnel.--For the purposes of carrying out the duties of an office of independent counsel, such independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. Such employees shall be compensated at levels not to exceed those payable for comparable positions in the Office of United States Attorney for the District of Columbia under sections 548 and 550, but in no event shall any such employee be compensated at a rate greater than the rate of basic pay payable for level ES-4 of the Senior Executive Service Schedule under section 5382 of title 5, as adjusted for the District of Columbia under section 5304 of that title regardless of the locality in which an employee is employed.

(d) Assistance of Department of Justice.--

(1) In carrying out functions.--An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties. At the request of an

independent counsel, prosecutors, administrative personnel, and other employees of the Department of Justice may be detailed to the staff of the independent counsel.

(2) Payment of and reports on expenditures of independent counsel.--The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel. The Attorney General shall submit to the Congress, not later than 30 days after the end of each fiscal year, a report on amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel. Each such report shall include a statement of all payments made for activities of independent counsel but may not reveal the identity or prosecutorial jurisdiction of any independent counsel which has not been disclosed under section 593(b)(4).

(e) Referral of other matters to an independent counsel.--An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the Attorney General's own initiative, the independent counsel shall so notify the division of the court.

(f) Compliance with policies of the Department of Justice.--

(1) In general.--An independent counsel shall, except to the extent that to do so would be inconsistent with the purposes of this chapter, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws. To determine these policies and policies under subsection (l)(1)(B), the independent counsel shall, except to the extent that doing so would be inconsistent with the purposes of this chapter, consult with the Department of Justice.

(2) National security.--An independent counsel shall comply with guidelines and procedures used by the Department in the handling and use of classified material.

(g) Dismissal of matters.--The independent counsel shall have full authority to dismiss matters within the independent counsel's prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution, if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(h) Reports by independent counsel.--

(1) Required reports.--An independent counsel shall--

(A) file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period thereafter until the office of that independent counsel terminates, a report which identifies and explains major expenses, and summarizes all other expenses, incurred by that office during the 6-month period with respect to

which the report is filed, and estimates future expenses of that office; and

(B) before the termination of the independent counsel's office under section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought.

(2) Disclosure of information in reports.--The division of the court may release to the Congress, the public, or any appropriate person, such portions of a report made under this subsection as the division of the court considers appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a final report filed under paragraph (1)(B) available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may, in the discretion of the division of the court, be included as an appendix to such final report.

(3) Publication of reports.--At the request of an independent counsel, the Public Printer shall cause to be printed any report previously released to the public under paragraph (2). The independent counsel shall certify the number of copies necessary for the public, and the Public Printer shall place the cost of the required number to the debit of such independent counsel. Additional copies shall be made available to the public through the depository

library program and Superintendent of Documents sales program pursuant to sections 1702 and 1903 of title 44.

(i) Independence from Department of Justice.--Each independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of sections 202 through 209 of title 18.

(j) Standards of conduct applicable to independent counsel, persons serving in the office of an independent counsel, and their law firms.--

(1) Restrictions on employment while independent counsel and appointees are serving.--

(A) During the period in which an independent counsel is serving under this chapter--

(i) such independent counsel, and

(ii) any person associated with a firm with which such independent counsel is associated, may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(B) During the period in which any person appointed by an independent counsel under subsection (c) is serving in the office of independent counsel, such person may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(2) Post employment restrictions on independent counsel and appointees.--(A) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 3 years following the termination of the service under this chapter of that independent counsel or appointed person, as the case may

be, represent any person in any matter if that individual was the subject of an investigation or prosecution under this chapter that was conducted by that independent counsel.

(B) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 1 year following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter involving any investigation or prosecution under this chapter.

(3) One-year ban on representation by members of firms of independent counsel.--Any person who is associated with a firm with which an independent counsel is associated or becomes associated after termination of the service of that independent counsel under this chapter may not, for 1 year following such termination, represent any person in any matter involving any investigation or prosecution under this chapter.

(4) Definitions.--For purposes of this subsection--

(A) the term "firm" means a law firm whether organized as a partnership or corporation; and

(B) a person is "associated" with a firm if that person is an officer, director, partner, or other member or employee of that firm.

(5) Enforcement.--The Attorney General and the Director of the Office of Government Ethics have authority to enforce compliance with this subsection.

(k) Custody of records of an independent counsel.--

(1) Transfer of records.--Upon termination of the office of an independent counsel, that independent counsel shall transfer to the Archivist of the United States

all records which have been created or received by that office. Before this transfer, the independent counsel shall clearly identify which of these records are subject to rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials and which of these records have been classified as national security information. Any records which were compiled by an independent counsel and, upon termination of the independent counsel's office, were stored with the division of the court or elsewhere before the enactment of the Independent Counsel Reauthorization Act of 1987, shall also be transferred to the Archivist of the United States by the division of the court or the person in possession of such records.

(2) Maintenance, use, and disposal of records.--Records transferred to the Archivist under this chapter shall be maintained, used, and disposed of in accordance with chapters 21, 29, and 33 of title 44.

(3) Access to records.--

(A) In general.--Subject to paragraph (4), access to the records transferred to the Archivist under this chapter shall be governed by section 552 of title 5.

(B) Access by Department of Justice.--The Archivist shall, upon written application by the Attorney General, disclose any such records to the Department of Justice for purposes of an ongoing law enforcement investigation or court proceeding, except that, in the case of grand jury materials, such records shall be so disclosed only by order of the court of jurisdiction under rule 6(e) of the Federal Rules of Criminal Procedure.

(C) Exception.--Notwithstanding any restriction on access imposed by law, the Archivist and persons

employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to the records transferred to the Archivist under this chapter.

(4) Records provided by Congress.--Records of an investigation conducted by a committee of the House of Representatives or the Senate which are provided to an independent counsel to assist in an investigation or prosecution conducted by that independent counsel--

(A) shall be maintained as a separate body of records within the records of the independent counsel; and

(B) shall, after the records have been transferred to the Archivist under this chapter, be made available, except as provided in paragraph (3)(B) and (C), in accordance with the rules governing release of the records of the House of Congress that provided the records to the independent counsel.

Subparagraph (B) shall not apply to those records which have been surrendered pursuant to grand jury or court proceedings.

(l) Cost controls and administrative support.--

(1) Cost controls.--

(A) In general.--An independent counsel shall--

(i) conduct all activities with due regard for expense;

(ii) authorize only reasonable and lawful expenditures; and

(iii) promptly, upon taking office, assign to a specific employee the duty of certifying that expenditures of the independent counsel are reasonable and made in accordance with law.

(B) Liability for invalid certification.--An employee making a certification under subparagraph (A)(iii) shall be liable for an invalid certification to the same extent as a certifying official certifying a voucher is liable under section 3528 of title 31.

(C) Department of justice policies.--An independent counsel shall comply with the established policies of the Department of Justice respecting expenditures of funds, except to the extent that compliance would be inconsistent with the purposes of this chapter.

(2) Administrative support.--The Director of the Administrative Office of the United States Courts shall provide administrative support and guidance to each independent counsel. No officer or employee of the Administrative Office of the United States Courts shall disclose information related to an independent counsel's expenditures, personnel, or administrative acts or arrangements without the authorization of the independent counsel.

(3) Office space.--The Administrator of General Services, in consultation with the Director of the Administrative Office of the United States Courts, shall promptly provide appropriate office space for each independent counsel. Such office space shall be within a Federal building unless the Administrator of General Services determines that other arrangements would cost less. Until such office space is provided, the Administrative Office of the United States Courts shall

provide newly appointed independent counsels immediately upon appointment with appropriate, temporary office space, equipment, and supplies.

Amendments

1996 Amendments. Subsec. (b)(3)(A). Pub.L. 104-208, § 101(a) [s 118], substituted provisions allowing the 1-year period to be extended for successive 6-month periods if the independent counsel and the division of the court certify for provisions allowing the 1-year period to be extended by 6 months if the employee assigned duties under subsec. (l)(1)(A)(iii) certifies, and directed the substitution of "independent counsel" and "the division of the court" for "such employee" which could not be executed. See Codification note set out under this section.

1994 Amendments. Subsec. (b). Pub.L. 103-270, § 3(b), designated existing text as par. (1) and as so designated, added heading, and added pars. (2) and (3).

Subsec. (c). Pub.L. 103-270, § 3(c), substituted provision directing that additional employees be compensated at levels not to exceed those payable for comparable positions in Office of U.S. Attorney for District of Columbia, but in no event at rate greater than rate payable for level ES-4 of Senior Executive Service Schedule under section 5382 of Title 5, as adjusted, regardless of locality, for provision directing that no additional employee be compensated at a rate exceeding the maximum rate of pay payable for GS-18 of the General Schedule under section 5332 of Title 5.

Subsec. (d)(1). Pub.L. 103-270, § 3(m), added provision authorizing prosecutors, administrative personnel, and others to be detailed to independent counsel's staff upon request.

Subsec. (f). Pub.L. 103-270, § 3(e)(1), substituted "shall, except to the extent that to do so would be inconsistent with

the purposes of this chapter, comply," for "shall, except where not possible, comply".

Pub.L. 103-270, § 3(e)(2), added provision requiring consultation to determine Department of Justice and subsec. (l)(1)(B) policies.

Pub.L. 103-270, § 3(e)(3), designated existing text as par. (1) and as so designated, added heading, and added par. (2).

Subsec. (h)(1)(B). Pub.L. 103-270, § 3(o), struck out ", and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel" after "all cases brought".

Subsec. (h)(3). Pub.L. 103-270, § 3(f), added par. (3).

Subsec. (j)(5). Pub.L. 103-270, § 3(d), added par. (5).

Subsec. (l). Pub.L. 103-270, § 3(a), added subsec. (l).

1987 Amendments. Catchline. Pub.L. 100-191 substituted "an" for "a" preceding "independent counsel".

Subsec. (a). Pub.L. 100-191 added a subsec. (a) heading and re-enacted the existing text substantially without change.

Subsec. (b). Pub.L. 100-191 added a subsec. (b) heading and re-enacted the existing text substantially without change.

Subsec. (c). Pub.L. 100-191 added a subsec. (c) heading and re-enacted the existing text substantially without change.

Subsec. (d). Pub.L. 100-191 added a subsec. (d) heading.

Subsec. (d)(1). Pub.L. 100-191 designated the existing provisions of subsec. (d) as par. (1), re-enacted such provisions substantially without change, and added a par. (1) heading.

Subsec. (d)(2). Pub.L. 100-191 added par. (2).

Subsec. (e). Pub.L. 100-191 added a subsec. (e) heading and re-enacted existing text substantially without change.

Subsec. (f). Pub.L. 100-191 added a subsec. (f) heading and re-enacted existing text without change.

Subsec. (g). Pub.L. 100-191 added a subsec. (g) heading and re-enacted existing text substantially without change.

Subsec. (h) to (k). Pub.L. 100-191 added subsecs. (h) to (k).

1986 Amendments. Subsec.(a)(8). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954".

1983 Amendments. Catchline. Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Subsec. (a). Pub.L. 97-409, § 2(a)(1), substituted "independent counsel" for "special prosecutor" wherever appearing and "independent counsel's" for "special prosecutor's".

Subsec. (a)(10). Pub.L. 97-409, § 6(a), added par. (10).

Subsecs. (b), (c). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Subsecs. (d), (e). Pub.L. 97-409, § 2(a)(1), substituted "independent counsel" for "special prosecutor" and "independent counsel's" for "special prosecutor's" wherever appearing.

Subsec. (f). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Pub.L. 97-409, § 6(b), substituted "except where not possible" for "to the extent that such special prosecutor deems appropriate" after "shall," and "written or other established policies" for "written policies" after "comply with the".

Subsec. (g). Pub.L. 97-409, § 6(c), added subsec. (g).

Effective Dates

1994 Acts. Amendment by Pub.L. 103-270 applicable with respect to independent counsels appointed before, on, or after June 30, 1994, with transition provisions relating to assignment of employee to certify expenditures, and relating to office space, travel and subsistence expenses, and rates of compensation under this section, and with provision directing that no amendment made by Pub.L. 103-270 establishing or modifying a reporting requirement be construed to require that a report submitted prior to June 30, 1994 be supplemented to include information with respect to activity occurring during any time period, see section 7(a) to (e), (g) of Pub.L. 103-270, set out as a note under section 591 of this title.

1987 Acts. Amendment by Pub.L. 100-191 effective Dec. 15, 1987, and applicable to proceedings initiated and independent counsels appointed on and after Dec. 15, 1987, but with the following provisions applicable to previously initiated proceedings pending on Dec. 15, 1987: subsec. (d)(2) (relating to reports by Attorney General on expenditures by independent counsel, except that the first such report shall be made only with respect to expenditures on or after Dec. 15, 1987), subsec. (h)(1)(A) except that the 6-month periods described in subsec. (h)(1)(A) of this section shall be calculated from Dec. 15, 1987, subsec. (i), subsec. (k) of this section, and 90 days after Dec. 15, 1987, subsec.

(j), see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

§ 595. Congressional oversight

(a) Oversight of conduct of independent counsel.--

(1) Congressional oversight.--The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(2) Reports to Congress.--An independent counsel appointed under this chapter shall submit to the Congress annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such report may omit any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made.

(b) Oversight of conduct of Attorney General.--Within 15 days after receiving an inquiry about a particular case under this chapter, which is a matter of public knowledge, from a committee of the Congress with jurisdiction over this chapter, the Attorney General shall provide the following information to that committee with respect to that case:

(1) When the information about the case was received.

(2) Whether a preliminary investigation is being conducted, and if so, the date it began.

(3) Whether an application for the appointment of an independent counsel or a notification that further investigation is not warranted has been filed with the division of the court, and if so, the date of such filing.

(c) Information relating to impeachment.--An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

Amendments

1994 Amendments. Subsec. (a)(2). Pub.L. 103-270, § 3(g), substituted provisions requiring annual report on activities including description of progress of any investigation or prosecution, and permitting omission of confidential matter, for provision requiring statements or reports on activities as considered appropriate.

1987 Amendments. Catchline. Pub.L. 100-191 substituted "Congressional oversight" for "Reporting and congressional oversight".

Subsec. (a). Pub.L. 100-191 added subsec. (a) heading and, in text, added par. (1) and designated existing provisions as par. (2), and in par. (2), as so designated, deleted provisions authorizing the independent counsel to make public

from time to time statements or reports on the independent counsel's activities.

Subsec. (b). Pub.L. 100-191 substituted provisions requiring the Attorney General to respond to inquiries by Congress conducting oversight of the independent counsel process for former provisions which required the independent counsel to submit a report describing the work of the independent counsel, and authorized the court to release to the Congress, the public, or to any appropriate person, appropriate portions of the report.

Subsec. (c). Pub.L. 100-191 added subsec. (c) heading and, in text, re-enacted existing provisions adding requirement that the independent counsel receive information as part of the independent counsel's activities in carrying out the independent counsel's responsibilities under this chapter.

Subsec. (d). Pub.L. 100-191 struck out subsec. (d) which related to Congressional oversight jurisdiction of official conduct of the independent counsel.

Subsec. (e). Pub.L. 100-191 struck out subsec. (e), which had provided that a majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress could request in writing that the Attorney General apply for the appointment of an independent counsel, that not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request was made, whichever was later, the Attorney General had to provide written notification of any action the Attorney General had taken in response to such request and, if no application had been made to the division of the court, why such application had not been made, and that such written notification was to be provided to the committee on which the persons making the request

served, and provided for confidential treatment of such notification.

1983 Amendments. Pub.L. 97-409, § 2(a)(1), substituted "independent counsel" for "special prosecutor" and "independent counsel's" for "special prosecutor's" wherever appearing.

Effective Dates

1994 Acts. Amendment by Pub.L. 103-270 applicable with respect to independent counsels appointed before, on, or after June 30, 1994, with provision directing that no amendment made by Pub.L. 103-270 establishing or modifying a reporting requirement be construed to require that a report submitted prior to June 30, 1994 be supplemented to include information with respect to any time period, see section 7(a), (g) of Pub.L. 103-270, set out as a note under section 591 of this title.

1987 Acts. Amendment by Pub.L. 100-191 effective Dec. 15, 1987, and applicable to proceedings initiated and independent counsels appointed on and after Dec. 15, 1987, see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

§ 596. Removal of an independent counsel; termination of office

(a) Removal; report on removal.--

(1) Grounds for removal.--An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability (if not prohibited by law protecting persons from discrimination on the basis of such a disability),,[1] or any other condition that substantially impairs the performance of such independent counsel's duties.

(2) Report to division of the court and Congress.--If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report. The division of the court may release any or all of such report in accordance with section 594(h)(2).

(3) Judicial review of removal.--An independent counsel removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia. A

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[1] So in original.

member of the division of the court may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court.

(b) Termination of office.--

(1) Termination by action of independent counsel.--An office of independent counsel shall terminate when--

(A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions; and

(B) the independent counsel files a final report in compliance with section 594(h)(1)(B).

(2) Termination by division of the court.--The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of such termination, the independent counsel shall file the final report required by section 594(h)(1)(B). If the Attorney

General has not made a request under this paragraph, the division of the court shall determine on its own motion whether termination is appropriate under this paragraph no later than 2 years after the appointment of an independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.

(c) Audits.--(1) On or before June 30 of each year, an independent counsel shall prepare a statement of expenditures for the 6 months that ended on the immediately preceding March 31. On or before December 31 of each year, an independent counsel shall prepare a statement of expenditures for the fiscal year that ended on the immediately preceding September 30. An independent counsel whose office is terminated prior to the end of the fiscal year shall prepare a statement of expenditures on or before the date that is 90 days after the date on which the office is terminated.

(2) The Comptroller General shall--

(A) conduct a financial review of a mid-year statement and a financial audit of a year-end statement and statement on termination; and

(B) report the results to the Committee on the Judiciary, Committee on Governmental Affairs, and Committee on Appropriations of the Senate and the Committee on the Judiciary, Committee on Government Operations, and Committee on Appropriations of the House of Representatives not later than 90 days following the submission of each such statement.

Amendments

1994 Amendments. Subsec. (a)(1). Pub.L. 103-270, § 5, substituted "physical or mental disability (if not prohibited by

law protecting persons from discrimination on the basis of such a disability)," for "physical disability, mental incapacity".

Subsec. (b)(2). Pub.L. 103-270, § 3(h), added provision relating to termination no later than 2 years after appointment of independent counsel, at the end of the succeeding 2-year period, and thereafter at the end of each succeeding 1-year period.

Subsec. (c). Pub.L. 103-270, § 3(i), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows:

"(c) Audits.--After the termination of the office of an independent counsel, the Comptroller General shall conduct an audit of the expenditures of that office, and shall submit to the appropriate committees of the Congress a report on the audit."

1987 Amendments. Catchline. Pub.L. 100-191 substituted "an independent counsel" for "a independent counsel".

Subsec. (a). Pub.L. 100-191 added subsec. (a) heading.

Subsec. (a)(1). Pub.L. 100-191 added a par. (1) heading and re-enacted the text substantially without change.

Subsec. (a)(2). Pub.L. 100-191 added par. (2) heading and re-enacted the text substantially without change.

Subsec. (a)(3). Pub.L. 100-191 added par. (3) heading and re-enacted the text substantially without change save for the substitution of "the United States District Court for the District of Columbia" for "the division of the court" as the tribunal for judicial review of the removal.

Subsec. (b). Pub.L. 100-191 added subsec. (b) heading.

Subsec. (b)(1). Pub.L. 100-191 added par. (1) heading and re-enacted the text substantially without change.

Subsec. (b)(2). Pub.L. 100-191 added par. (2) heading and re-enacted the text substantially without change.

Subsec. (c). Pub.L. 100-191 added subsec. (c).

1984 Amendments. Subsec. (a)(3). Pub.L. 98-620 struck out provision requiring the division of the court to cause such an action to be in every way expedited.

1983 Amendments. Catchline. Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor".

Subsec. (a)(1). Pub.L. 97-409, § 2(a)(1), (6)(d), substituted "independent counsel" for "special prosecutor", "independent counsel's" for "special prosecutor's", and "good cause" for "extraordinary impropriety".

Subsecs. (a)(2) (3), (b). Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Effective Dates

1994 Acts. Amendment by Pub.L. 103-270 applicable with respect to independent counsels appointed before, on, or after June 30, 1994, with provisions directing that determinations by the division of the court contained in the last sentence of subsec. (b)(2) of this section shall, for the office of an independent counsel appointed before June 30, 1994, be required no later than 1 year after June 30, 1994, and at the end of each succeeding 1-year period, and provisions directing that no amendment made by Pub.L. 103-270 establishing or modifying a reporting requirement be construed to require that a report submitted prior to June 30, 1994 be supplemented to include information with respect to activity occurring during any time period, see section 7(a),

(f), (g) of Pub.L. 103-270, set out as a note under section 591 of this title.

1987 Acts. Amendment by Pub.L. 100-191 effective Dec. 15, 1987, and applicable to proceedings initiated and independent counsels appointed on and after Dec. 15, 1987, but with subsecs. (a)(3) and (c) applicable to previously initiated proceedings pending on Dec. 15, 1987, see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1984 Acts. Amendment by Pub.L. 98-620 not to apply to cases pending on Nov. 8, 1984, see section 403 of Pub.L. 98-620, set out as a note under section 1657 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

Change of Name

Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Government Operations of the House of Representatives treated as referring to the Committee on Government Reform and Oversight of the House of Representatives, except that any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Government Operations of the House of Representatives treated as referring to the Committee on the Budget of the House of Representatives in the case of a provision of law relating to the establishment, extension, and enforcement of special controls over the Federal budget, see section 1(a)(6) and (c)(2) of Pub.L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.

§ 597. Relationship with Department of Justice

(a) Suspension of other investigations and proceedings.--Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d)(1), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Presentation as amicus curiae permitted.--Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

Amendments

1987 Amendments. Subsec. (a). Pub.L. 100-191 added subsec. (a) heading and re-enacted the text substantially without change.

Subsec. (b). Pub.L. 100-191 added subsec. (b) heading and re-enacted the text substantially without change.

1983 Amendments. Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Effective Dates

1987 Acts. Amendment by Pub.L. 100-191 effective Dec. 15, 1987, and applicable to proceedings initiated and independent counsels appointed on and after Dec. 15, 1987,

section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

§ 598. Severability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected by such invalidation.

Amendments

1987 Amendments. Pub.L. 100-191 substituted provisions relating to the severability of the provisions of this chapter for former provisions which had related to the termination of this chapter. Provisions covering the termination of this chapter were transferred to section 599 of this title.

1983 Amendments. Pub.L. 97-409, § 2(a)(1)(A), substituted "independent counsel" for "special prosecutor" wherever appearing.

Pub.L. 97-409, § 7, substituted reference to the date of enactment of the Ethics in Government Act Amendments of 1982 for reference to the date of enactment of this chapter.

Effective Dates

1987 Acts. Amendment by Pub.L. 100-191 effective Dec. 15, 1987, and to apply only to new independent counsel proceedings and to new independent counsels coming into

existence on and after Dec. 15, 1987, see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

1978 Acts. Section effective Oct. 26, 1978, except for specific information received by the Attorney General pursuant to section 591 of this title based on determinations made by the Attorney General respecting such information, see section 604 of Pub.L. 95-521, set out as a note under section 591 of this title.

§ 599. Termination of effect of chapter

This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1994, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

Amendments

1994 Amendments. Pub.L. 103-270, § 2, extended termination of effect of chapter from five years after date of enactment of the Independent Counsel Reauthorization Act of 1987 to five years after date of enactment of the Independent Counsel Reauthorization Act of 1994.

Effective Dates

1994 Acts. Amendment by Pub.L. 103-270 applicable with respect to independent counsels appointed before, on, or after June 30, 1994, see section 7(a) of Pub.L. 103-270, set out as a note under section 591 of this title.

1987 Acts. Section effective Dec. 15, 1987, see section 6 of Pub.L. 100-191, set out as a note under section 591 of this title.

APPENDIX F

CODE OF FEDERAL REGULATIONS
TITLE 5
§§ 2634.104, 2634.105, 2634.202, 2634.302, 2634.304, 2634.305, 2634.306, 2634.308, 2634.309

§ 2634.104 Policies.

(a) Title I of the Act requires that high-level Federal officials disclose publicly their personal financial interests, to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust. Title I also authorizes the Office of Government Ethics to establish a confidential (nonpublic) financial disclosure system for less senior executive branch personnel in certain designated positions, to facilitate internal agency conflict-of-interest review.

(b) Public and confidential financial disclosure serves to prevent conflicts of interest and to identify potential conflicts, by providing for a systematic review of the financial interests of both current and prospective officers and employees. These reports assist agencies in administering their ethics programs and providing counseling to employees.

(c) Financial disclosure reports are not net worth statements. Financial disclosure systems seek only the information that the President, Congress, or OGE as the supervising ethics office for the executive branch has deemed relevant to the administration and application of the criminal conflict of interest laws, other statutes on ethical conduct or financial interests, and Executive orders or regulations on standards of ethical conduct.

(d) Nothing in the Act or this part requiring reporting of information or the filing of any report shall be deemed to

authorize receipt of income, honoraria, gifts, or reimbursements; holding of assets, liabilities, or positions; or involvement in transactions that are prohibited by law, Executive order or regulation.

(e) The provisions of title I of the Act and this part requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation on the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest. However, the provisions of title I and this part shall not supersede the requirements of 5 U.S.C. 7342 (the Foreign Gifts and Decorations Act).

(f) This regulation is intended to be gender-neutral; therefore, use of the term he, his, and him include she, hers, and her, and vice versa.

§ 2634.105 Definitions.

For purposes of this part:

(a) Act means the Ethics in Government Act of 1978 (Pub.L. 95-521, as amended), as modified by the Ethics Reform Act of 1989 (Pub.L. 101-194, as amended).

(b) Agency means any executive agency as defined in 5 U.S.C. 105 (any executive department, Government corporation, or independent establishment in the executive branch), any military department as defined in 5 U.S.C. 102, and the Postal Service and the Postal Rate Commission. It does not include the General Accounting Office.

(c) Confidential filer. For the definition of "confidential filer," see § 2634.904.

(d) Dependent child means, when used with respect to any reporting individual, any individual who is a son, daughter, stepson, or stepdaughter and who:

(1) Is unmarried, under age 21, and living in the household of the reporting individual; or

(2) Is a dependent of the reporting individual within the meaning of section 152 of the Internal Revenue Code of 1986, 26 U.S.C. 152.

(e) Designated agency ethics official means the primary officer or employee who is designated by the head of an agency to administer the provisions of title I of the Act and this part within an agency, and in his absence the alternate who is designated by the head of the agency. The term also includes a delegate of such an official, unless otherwise indicated. See subpart B of part 2638 of this chapter on the appointment and additional responsibilities of a designated agency ethics official and alternate.

(f) Executive branch means any agency as defined in paragraph (b) of this section and any other entity or administrative unit in the executive branch.

(g) Filer is used interchangeably with "reporting individual," and may refer to a "confidential filer" as defined in paragraph (c) of this section, a "public filer" as defined in paragraph (m) of this section, or a nominee or candidate as described in § 2634.201.

(h) Gift means a payment, advance, forbearance, rendering, or deposit of money, or anything of value, unless consideration of equal or greater value is received by the donor, but does not include:

(1) Bequests and other forms of inheritance;

(2) Suitable mementos of a function honoring the reporting individual;

(3) Food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or

by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(4) Food and beverages which are not consumed in connection with a gift of overnight lodging;

(5) Communications to the offices of a reporting individual, including subscriptions to newspapers and periodicals;

(6) Consumable products provided by home-State businesses to the offices of the President or Vice President, if those products are intended for consumption by persons other than the President or Vice President; or

(i) Honorarium means a payment of money or anything of value for an appearance, speech, or article.

(j) Income means all income from whatever source derived. It includes but is not limited to the following items: earned income such as compensation for services, fees, commissions, salaries, wages and similar items; gross income derived from business (and net income if the individual elects to include it); gains derived from dealings in property including capital gains; interest; rents; royalties; dividends; annuities; income from the investment portion of life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; and income from an interest in an estate or trust. The term includes all income items, regardless of whether they are taxable for Federal income tax purposes, such as interest on municipal bonds. Generally, income means "gross income" as determined in conformity with the Internal Revenue Service principles at 26 CFR 1.61-1 through 1.61-15 and 1.61-21.

(k) Personal hospitality of any individual means, hospitality extended for a nonbusiness purpose by an

individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or his family.

(l) Personal residence means any real property used exclusively as a private dwelling by the reporting individual or his spouse, which is not rented out during any portion of the reporting period. The term is not limited to one's domicile; there may be more than one personal residence, including a vacation home.

(m) Public filer. For the definition of "public filer," see § 2634.202.

(n) Reimbursement means any payment or other thing of value received by the reporting individual (other than gifts, as defined in paragraph (h) of this section) to cover travel-related expenses of such individual, other than those which are:

(1) Provided by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(2) Required to be reported by the reporting individual under 5 U.S.C. 7342 (the Foreign Gifts and Decorations Act); or

(3) Required to be reported under section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434) (relating to reports of campaign contributions).

Note: Payments which are not made to the individual are not reimbursements for purposes of this part. Thus, payments made to the filer's employing agency to cover official travel-related expenses do not fit this definition of reimbursement. For example, payments being accepted by the agency pursuant to statutory authority such as 31 U.S.C. 1353, as implemented by 41 CFR part 304-1, are not considered reimbursements under this part 2634, because they

are not payments received by the reporting individual. On the other hand, travel payments made to the employee by an outside entity for private travel are considered reimbursements for purposes of this part. Likewise, travel payments received from certain nonprofit entities under authority of 5 U.S.C. 4111 are considered reimbursements, even though for official travel, since that statute specifies that such payments must be made to the individual directly (with prior approval from the individual's agency).

(o) Relative means an individual who is related to the reporting individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great uncle, great aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, half sister, or who is the grandfather or grandmother of the spouse of the reporting individual, and shall be deemed to include the fiance or fiancee of the reporting individual.

(p) Reporting individual is used interchangeably with "filer," and may refer to a "confidential filer" as defined in § 2634.904, a "public filer" as defined in § 2634.202, or a nominee or candidate as described in § 2634.201.

(q) Reviewing official means the designated agency ethics official or his delegate, the Secretary concerned, the head of the agency, or the Director of the Office of Government Ethics.

(r) Secretary concerned has the meaning set forth in 10 U.S.C. 101(8) (relating to the Secretaries of the Army, Navy, Air Force, and for certain Coast Guard matters, the Secretary of Transportation); and, in addition, means:

(1) The Secretary of Commerce, in matters concerning the National Oceanic and Atmospheric Administration;

(2) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(3) The Secretary of State with respect to matters concerning the Foreign Service.

(s) Special Government employee has the meaning given to that term by the first sentence of 18 U.S.C. 202(a): an officer or employee of an agency who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, either on a full-time or intermittent basis.

(t) Value means a good faith estimate of the fair market value if the exact value is neither known nor easily obtainable by the reporting individual without undue hardship or expense. In the case of any interest in property, see the alternative valuation options in § 2634.301(e).

For gifts and reimbursements, see § 2634.304(e).

§ 2634.202 Public filer defined.

The term public filer includes:

(a) The President;

(b) The Vice President;

(c) Each officer or employee in the executive branch, including a special Government employee as defined in 18 U.S.C. 202(a), whose position is classified above GS-15 of the General Schedule prescribed by 5 U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General

Schedule; each member of a uniformed service whose pay grade is at or in excess of 0-7 under 37 U.S.C. 201; and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification;

(d) Each employee who is an administrative law judge appointed pursuant to 5 U.S.C. 3105;

(e) Any employee not otherwise described in paragraph (c) of this section who is in a position in the executive branch which is excepted from the competitive service by reason of being of a confidential or policy-making character, unless excluded by virtue of a determination under § 2634.203 of this subpart;

(f) The Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the United States Postal Service and each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule;

(g) The Director of the Office of Government Ethics and each agency's primary designated agency ethics official;

(h) Any civilian employee not otherwise described in paragraph (c) of this section who is employed in the Executive Office of the President (other than a special Government employee, as defined in 18 U.S.C. 202(a)) and holds a commission of appointment from the President; and

(i) Anyone whose employment in a position or office described in paragraphs (a) through (h) of this section has terminated, but who has not yet satisfied the filing requirements of § 2634.201(e) of this subpart.

Note: References in this section and in 2634.203 and 2634.904 to position classifications have been adjusted to reflect elimination of General Schedule classifications GS-16, GS-17, and GS-18 by the Federal Employees Pay Comparability Act of 1990, as incorporated in section 529 of Public Law 101-509.

§ 2634.302 Income.

(a) Noninvestment income.

(1) Each financial disclosure report filed pursuant to this part, whether public or confidential, shall disclose the source, type, and in the case of public financial disclosure reports the actual amount or value, of earned or other noninvestment income in excess of $200 from any one source which is received by the filer or has accrued to his benefit during the reporting period, including:

(i) Salaries, fees, commissions, wages and any other compensation for personal services (other than from United States Government employment);

(ii) Retirement benefits (other than from United States Government employment, including the Thrift Savings Plan, or from Social Security);

(iii) Any honoraria, and the date services were provided, including payments made or to be made to charitable organizations on behalf of the filer in lieu of honoraria; and

(iv) Any other noninvestment income, such as prizes, awards, or discharge of indebtedness.

Note: In calculating the amount of an honorarium, subtract any actual and necessary travel expenses incurred by the recipient and one relative. For example, if such expenses are paid or reimbursed by the honorarium source, they shall not be counted as part of the honorarium payment; if the

expenses are paid or reimbursed by the individual receiving the honorarium, the amount of honorarium shall be reduced by the amount of such expenses.

Example 1. An official is a participant in a retirement plan of Coastal Airlines. Pursuant to such plan, the official and his spouse receive passage on some Coastal flights without charge, and they receive passage on other flights at a discounted fare. The difference between what Coastal charges members of the public generally and what the official and his spouse are charged for a particular flight is deemed income in-kind and must be disclosed by this reporting individual if it exceeds the $200 threshold.

Example 2. An official serves on the board of directors at a bank, for which he receives a $500 fee each calendar quarter. He also receives an annual fee of $1,500 for service as trustee of a private trust. In both instances, such fees received or earned during the reporting period must be disclosed, and if he is a public filer the actual amount must be shown.

(2) In the case of payments in lieu of honoraria, made on or after January 1, 1991, the individual shall also file a separate confidential report of charitable receipients, in accordance with part 2636 of this

(b) Investment income. Each financial disclosure report filed pursuant to this part, whether public or confidential, shall disclose:

(1) The source and type of investment income, characterized as dividends, rents, interest, capital gains, or income from qualified or excepted trusts or excepted investment funds (see § 2634.310 of this subpart), which is received by the filer or accrued to his benefit during the reporting period, and which exceeds $200 in amount or value

from any one source. Examples include, but are not limited to, income derived from real estate, collectible items, stocks, bonds, notes, copyrights, pensions, mutual funds, the investment portion of life insurance contracts, loans, and personal savings accounts (as defined in § 2634.301(c)(2) of this subpart). Note that for entities with portfolio holdings, such as Individual Retirement Accounts (IRA's), brokerage accounts, trusts, and mutual or pension funds, each underlying source of income must be separately disclosed, unless the entity qualifies for special treatment under § 2634.310 of this subpart. For public financial disclosure reports, the amount or value of income from each reported source shall also be disclosed and categorized in accordance with the following table:

(i) Not more than $1,000;

(ii) Greater than $1,000 but not more than $2,500;

(iii) Greater than $2,500 but not more than $5,000;

(iv) Greater than $5,000 but not more than $15,000;

(v) Greater than $15,000 but not more than $50,000;

(vi) Greater than $50,000 but not more than $100,000;

(vii) Greater than $100,000 but not more than $1,000,000; and

(viii) Greater than $1,000,000.

(2) The source, type, and in the case of public financial disclosure reports the actual amount or value, of gross income from a business, distributive share of a partnership, joint business venture income, payments from an estate or an annuity or endowment contract, or any other items of income not otherwise covered by paragraphs (a) or (b)(1) of this section which are received by the filer or accrued to his

benefit during the reporting period and which exceed $200 from any one source.

Example 1. An official rents out a portion of his residence. He receives rental income of $600 from one individual for four months and $1,200 from another individual for the remaining eight months of the year covered by his incumbent financial disclosure report. He must identify the property, specify the type of income (rent), and if he is a public filer indicate the category of the total amount of rent received. (He must also disclose the asset information required by § 2634.301 of this subpart.)

Example 2. A reporting individual has three savings accounts with Bank A. One is in his name and earned $85 in interest during the reporting period. One is in a joint account with his spouse and earned $120 in interest. One is in his name and his dependent daughter's name and earned $35 in interest. Since the aggregate interest income from this source exceeds $200, the official must disclose the name of the bank, the type of income, and if he is a public filer, the category of the total amount of interest earned from all three accounts. (He must also disclose the accounts as assets under § 2634.301 of this subpart if, in the aggregate, they total more than $5,000 in that bank.)

Example 3. An official has an ownership interest in a fast-food restaurant, from which she receives $10,000 in annual income. She must specify on her financial disclosure report the type of income, such as partnership distributive share or gross business income, and if she is a public filer indicate the actual amount of such income. (Additionally, she must describe the business and categorize its asset value, pursuant to § 2634.301 of this subpart).

§ 2634.304 Gifts and reimbursements.

(a) Gifts. Except as indicated in §§ 2634.308(b) and 2634.907(a), each financial disclosure report filed pursuant to this part, whether public or confidential, shall contain the identity of the source, a brief description, and in the case of public financial disclosure reports the value, of all gifts aggregating $250 or more in value which are received by the filer during the reporting period from any one source. For in-kind travel-related gifts, include a travel itinerary, dates, and nature of expenses provided.

(b) Reimbursements. Except as indicated in §§ 2634.308(b) and 2634.907(a), each financial disclosure report filed pursuant to this part, whether public or confidential, shall contain the identity of the source, a brief description (including a travel itinerary, dates, and the nature of expenses provided), and in the case of public financial disclosure reports the value, of any travel-related reimbursements aggregating $250 or more in value, which are received by the filer during the reporting period from any one source.

Note: The $250 threshold in paragraphs (a) and (b) of this section will increase if the definition of minimal value under the Foreign Gifts and Decorations Act ever exceeds $250. Section 314(a) of Public Law 102-90 established the threshold for financial disclosure of gifts and reimbursements as "more than the minimal value as established by section 7342(a)(5) of title 5, United States Code, or $250, whichever is greater."

(c) Exclusions. Reports need not contain any information about gifts and reimbursements to which the provisions of this section would otherwise apply which are received from relatives (see § 2634.105(o)) or during a period in which the filer was not an officer or employee of the Federal Government. Additionally, any food, lodging, or

entertainment received as "personal hospitality of any individual," as defined in § 2634.105(k), need not be reported. See also exclusions specified in the definitions of gift and reimbursement, at § 2634.105(h) and (n).

(d) Aggregation exception. Any gift or reimbursement with a fair market value of $100 or less need not be aggregated for purposes of the reporting rules of this section. However, the acceptance of gifts, whether or not reportable, is subject to the restrictions imposed by Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations on standards of ethical conduct.

Note: The aggregation exception for gifts or reimbursements with a fair market value of $100 or less will increase if the definition of minimal value under the Foreign Gifts and Decorations Act ever exceeds $250. Section 314(a) of Public Law 102-90 established the aggregation exception for "any gift with a fair market value of $100 or less, as adjusted at the same time and by the same percentage as the minimal value is adjusted" above $250 pursuant to 5 U.S.C. 7342(a)(5).

Example 1. An official accepts a print, a pen and pencil set, and a letter opener from a community service organization he has worked with solely in his private capacity. He determines, in accordance with paragraph (e) of this section, that these gifts are valued as follows:

Gift 1--Print: $150

Gift 2--Pen and pencil set: $105

Gift 3--Letter opener: $20

The official must disclose Gifts 1 and 2, since together they aggregate $250 or more in value from the same source. Gift 3 need not be aggregated, because its value does not exceed $100.

Example 2. An official receives the following gifts from a single source:

1. Dinner for two at a local restaurant--$120.

2. Round-trip taxi fare to meet donor at the restaurant--$25.

3. Dinner at donor's city residence--(value uncertain).

4. Round-trip airline transportation and hotel accommodations to visit Epcot Center in Florida--$400.

5. Weekend at donor's country home, including duck hunting and tennis match--(value uncertain).

The official need only disclose Gift 4. Gift 1 falls within the exception in § 2634.105(h) for food and beverages not consumed in connection with a gift of overnight lodging. Gifts 3 and 5 need not be disclosed because they fall within the exception for personal hospitality of an individual. Gift 2 need not be aggregated and reported, because its value does not exceed $100.

Example 3. An official receives free tickets from an outside source for himself and his spouse to attend an awards banquet at a local club. The value of each ticket is $130. Even though this is a gift which exceeds the $250 threshold amount for disclosure, the official need not report it, because of the exception in § 2634.105(h) for food and beverages not consumed in connection with a gift of overnight lodging.

Note: Prior to accepting this gift of tickets, the individual should consult ethics officials at his agency to determine whether standards of conduct rules will permit acceptance, depending on whether or not the donor is a prohibited source and the exact nature of the event.

Example 4. An official is asked to speak at an out-of-town meeting on a matter which is unrelated to her

official duties and her agency. The round-trip airfare exceeds $250. If the official pays for the ticket and is then reimbursed by the organization to which she spoke, she must disclose this reimbursement under paragraph (b) of this section. If the organization simply provided the ticket, that must be disclosed as a gift under paragraph (a) of this section.

(e) Valuation of gifts and reimbursements. The value to be assigned to a gift or reimbursement is its fair market value. For most reimbursements, this will be the amount actually received. For gifts, the value should be determined in one of the following manners:

(1) If the gift has been newly purchased or is readily available in the market, the value shall be its retail price. The filer need not contact the donor, but may contact a retail establishment selling similar items to determine the present cost in the market.

(2) If the item is not readily available in the market, such as a piece of art, a handmade item, or an antique, the filer may make a good faith estimate of the value of the item.

(3) The term readily available in the market means that an item generally is available for retail purchase in the metropolitan area nearest to the official's residence.

Example 1. Items such as a pen and pencil set, letter opener, leather case or engraved pen are generally available in the market and can be determined by contacting stores which sell like items and ascertaining the retail price of each.

Example 2. The value of a dinner at a restaurant can either be the actual cost of the reported dinners or the approximate value, based on the posted fare of the restaurant. The filer need not ask to see the check.

Note: The market value of a ticket entitling the holder to attend an event which includes food, refreshments,

entertainment or other benefits is the face value of the ticket, which may exceed the actual cost of the food and other benefits. The value of food and beverages may be excludable under § 2634.105(h)(4), if applicable, by making a good faith estimate, or by determining their actual cost from the caterer, restaurant, or similar source.

(f) Waiver rule in the case of certain gifts--

(1) In general. In unusual cases, a gift as defined in § 2634.105(h) need not be aggregated under this section by public filers, if the Director of the Office of Government Ethics receives a written request for and issues a waiver, after determining that:

(i) Both the basis of the relationship between the grantor and the grantee and the motivation behind the gift are entirely personal; and

(ii) No countervailing public purpose requires public disclosure of the nature, source, and value of the gift.

(2) Public disclosure of waiver request. If approved, the cover letter requesting the waiver shall be subject to the public disclosure requirements in § 2634.603 of this part.

(3) Procedure. A public filer seeking a waiver under this paragraph shall submit a request to the Office of Government Ethics, through his agency. The request shall be made by a cover letter which identifies the filer and his position and which states that a waiver is requested under this section. On an enclosure to the cover letter, the filer shall set forth:

(i) The identity and occupation of the donor;

(ii) A statement that the relationship between the donor and the filer is entirely personal in nature; and

(iii) A statement that neither the donor nor any person or organization who employs the donor or whom the donor

represents, conducts or seeks business with, engages in activities regulated by, or is directly affected by action taken by, the agency employing the filer. If the preceding statement cannot be made without qualification, the filer shall indicate those qualifications, along with a statement demonstrating that he plays no role in any official action which might directly affect the donor or any organization for which the donor works or serves as a representative.

§ 2634.305 Liabilities.

(a) In general. Each financial disclosure report filed pursuant to this part, whether public or confidential, shall identify and include a brief description of the filer's liabilities over $10,000 owed to any creditor at any time during the reporting period, and the name of the creditors to whom such liabilities are owed. For public financial disclosure reports, the report shall designate the category of value of the liabilities in accordance with § 2634.301(d) of this subpart, using the greatest amount owed to the creditor during the period.

(b) Exceptions. The following are not required to be reported under paragraph (a) of this section:

(1) Personal liabilities owed to a spouse or to the parent, brother, sister, or child of the filer, spouse, or dependent child;

(2) Any mortgage secured by a personal residence of the filer or his spouse;

(3) Any loan secured by a personal motor vehicle, household furniture, or appliances, provided that the loan does not exceed the purchase price of the item which secures it; and

(4) Any revolving charge account with an outstanding liability which does not exceed $10,000 at the close of the reporting period.

Example. An incumbent official has the following debts outstanding at the end of the calendar year:

1. Mortgage on personal residence--$80,000.

2. Mortgage on rental property--$50,000.

3. VISA Card--$1,000.

4. Master Card--$11,000.

5. Loan balance of $15,000, secured by family automobile purchased for $16,200.

6. Loan balance of $10,500, secured by antique furniture purchased for $8,000.

7. Loan from parents--$20,000.

The loans indicated in items 2, 4, and 6 must be disclosed. Loan 1 is exempt from disclosure under paragraph (b)(2) of this section because it is secured by the personal residence. Loan 3 need not be disclosed under paragraph (b)(4) of this section because it is considered to be a revolving charge account with an outstanding liability that does not exceed $10,000 at the end of the reporting period. Loan 5 need not be disclosed under paragraph (b)(3) of this section because it is secured by a personal motor vehicle which was purchased for more than the value of the loan. Loan 7 need not be disclosed because the creditors are persons specified in paragraph (b)(1) of this section.

§ 2634.306 Agreements and arrangements.

Each financial disclosure report filed pursuant to this part, whether public or confidential, shall identify the parties to and the date of, and shall briefly describe the terms of, any agreement or arrangement of the filer in existence at any time during the reporting period with respect to:

(a) Future employment;

(b) A leave of absence from employment during the period of the reporting individual's Government service;

(c) Continuation of payments by a former employer other than the United States Government; and

(d) Continuing participation in an employee welfare or benefit plan maintained by a former employer.

§ 2634.308 Reporting periods and contents of public financial disclosure reports.

(a) Incumbents. Each public financial disclosure report filed pursuant to § 2634.201(a) shall include on the standard form prescribed by the Office of Government Ethics consistent with subpart F of this part and in accordance with instructions issued by that Office, a full and complete statement of the information required to be reported according to the provisions of subpart C of this part, for the preceding calendar year (or for any portion of that year not already covered by a new entrant or nominee report filed under paragraph (b) or (c) of § 2634.201), and, in the case of §§ 2634.306 and 2634.307, for the additional period up to the date of filing.

(b) New entrants, nominees, and candidates. Each public financial disclosure report filed pursuant to § 2634.201(b), (c), or (d) shall include, on the standard form prescribed by the Office of Government Ethics consistent with

subpart F of this part and in accordance with instructions issued by that Office, a full and complete statement of the information required to be reported according to the provisions of subpart C of this part, except for § 2634.303 (relating to purchases, sales, and exchanges of certain property) and § 2634.304 (relating to gifts and reimbursements). The following special rules apply:

(1) Interests in property. For purposes of § 2634.301 of this subpart, the report shall include all interests in property specified by that section which are held on or after a date which is fewer than thirty-one days before the date on which the report is filed.

(2) Income. For purposes of § 2634.302 of this subpart, the report shall include all income items specified by that section which are received or accrued during the period beginning on January 1 of the preceding calendar year and ending on the date on which the report is filed, except as otherwise provided by § 2634.606 relating to updated disclosure for nominees.

(3) Liabilities. For purposes of § 2634.305 of this subpart, the report shall include all liabilities specified by that section which are owed during the period beginning on January 1 of the preceding calendar year and ending fewer than thirty-one days before the date on which the report is filed.

(4) Agreements and arrangements. For purposes of § 2634.306 of this subpart, the report shall include only those agreements and arrangements which still exist at the time of filing.

(5) Outside positions. For purposes of § 2634.307 of this subpart, the report shall include all such positions held during

the preceding two calendar years and the current calendar year up to the date of filing.

(6) Certain sources of compensation. Except in the case of the President, the Vice President, or a candidate referred to in § 2634.201(d), the report shall also identify the filer's sources of compensation which exceed $5,000 during either of the preceding two calendar years or during the current calendar year up to the date of filing, and shall briefly describe the nature of the duties performed or services rendered by the reporting individual for each such source of compensation. Information need not be reported, however, which is considered confidential as a result of a privileged relationship, established by law, between the reporting individual and any person. The report also need not contain any information with respect to any person for whom services were provided by any firm or association of which the reporting individual was a member, partner, or employee, unless such individual was directly involved in the provision of such services.

Example. A nominee who is a partner or employee of a law firm and who has worked on a matter involving a client from which the firm received over $5,000 in fees during a calendar year must report the name of the client only if the value of the services rendered by the nominee exceeded $5,000. The name of the client would not normally be considered confidential.

(c) Termination reports. Each public financial disclosure report filed under § 2634.201(e) shall include, on the standard form prescribed by the Office of Government Ethics consistent with subpart F of this part and in accordance with instructions issued by that Office, a full and complete statement of the information required to be reported according to the provisions of subpart C of this part, for the period

beginning on the last date covered by the most recent public financial disclosure report filed by the reporting individual under this part, or on January 1 of the preceding calendar year, whichever is later, and ending on the date on which the filer's employment terminates.

§ 2634.309 Spouses and dependent children.

(a) Special disclosure rules. Each report required by the provisions of either subpart B or subpart I of this part shall also include the following information with respect to the spouse or dependent children of the reporting individual:

(1) Income. For purposes of § 2634.302 of this subpart:

(i) With respect to a spouse, the source but not the amount of items of earned income (other than honoraria) which exceed $1,000 from any one source; and if items of earned income are derived from a spouse's self-employment in a business or profession, the nature of the business or profession but not the amount of the earned income;

(ii) With respect to a spouse, the source, and for a public financial disclosure report the actual amount or value, of any honoraria received by or accrued to the spouse (or payments made or to be made to charity on the spouse's behalf in lieu of honoraria) which exceed $200 from any one source, and the date on which the services were provided; and

(iii) With respect to a spouse or dependent child, the type and source, and for a public financial disclosure report the amount or value (category or actual amount, in accordance with § 2634.302 of this subpart), of all other income exceeding $200 from any one source, such as investment income from interests in property (if the

property itself is reportable according to § 2634.301 of this subpart).

Example 1. The spouse of a filer is employed as a teller at Bank X and earns $23,000 per year. The report must disclose that the spouse is employed by Bank X. The amount of the spouse's earnings need not be disclosed, either on a public or confidential financial disclosure report.

Example 2. The spouse of a reporting individual is self-employed as a pediatrician. The report must disclose that he is a physician, but need not disclose the amount of income, either on a public or confidential financial disclosure report.

(2) Gifts and reimbursements. For purposes of § 2634.304 of this subpart, gifts and reimbursements received by a spouse or dependent child which are not received totally independent of their relationship to the filer.

(3) Interests in property, transactions, and liabilities. For purposes of §§ 2634.301, 2634.303 (applicable only to public filers), and 2634.305 of this subpart, all information concerning property interests, transactions, or liabilities referred to by those sections of a spouse or dependent child, unless the following three conditions are satisfied:

(i) The filer certifies that the item represents the spouse's or dependent child's sole financial interest or responsibility, and that the filer has no specific knowledge regarding that item;

(ii) The item is not in any way, past or present, derived from the income, assets or activities of the filer; and

(iii) The filer neither derives, nor expects to derive, any financial or economic benefit from the item.

Note: One who prepares a joint tax return with his spouse will normally derive a financial or economic benefit from assets held by the spouse, and will also be charged with knowledge of such items; therefore he could not avail himself of this exception. Likewise, a trust for the education of one's minor child normally will convey a financial benefit to the parent. If so, the assets of the trust would be reportable on a financial disclosure statement.

(b) Exception. For reports filed as a new entrant, nominee, or candidate under § 2634.201(b), (c), or (d), or as a new entrant under § 2634.908(b), no information regarding gifts and reimbursements or transactions is required for a spouse or dependent child.

(c) Divorce and separation. A reporting individual need not report any information about:

(1) A spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation;

(2) A former spouse or a spouse from whom the reporting individual is permanently separated; or

(3) Any income or obligations of the reporting individual arising from dissolution of the reporting individual's marriage or permanent separation from a spouse.

APPENDIX G

PART F-OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1 *Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States*

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)	*Increase in Level*
(A) $2,000 or less	no increase
(B) More than $2,000	add 1
(C) More than $5,000	add 2
(D) More than $10,000	add 3
(E) More than $20,000	add 4
(F) More than $40,000	add 5
(G) More than $70,000	add 6
(H) More than $120,000	add 7
(I) More than $200,000	add 8
(J) More than $350,000	add 9
(K) More than $500,000	add 10
(L) More than $800,000	add 11
(M) More than $1,500,000	add 12
(N) More than $2,500,000	add 13
(O) More than $5,000,000	add 14
(P) More than $10,000,000	add 15
(Q) More than $20,000,000	add 16
(R) More than $40,000,000	add 17
(S) More than $80,000,000	add 18

(2) If the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim, increase by 2 levels.

(3) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency, or (B) violation of any judicial or administrative order, injunction, decree, or process nor addressed elsewhere in the guidelines, increase by 2 levels. If the resulting level is less than level 10, increase to level 10.

(4) If the offense involved (A) the conscious or reckless risk or serious bodily injury, or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 13, increase to level 13.

(5) If the offense involved the use of foreign bank accounts or transactions to conceal the true nature or extent of the fraudulent conduct, and the offense level is determined above is less than level 12, increase to level 12.

(6) If the offense –

(A) substantially jeopardized the safety and soundness of a financial institution; or

(B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,

increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

(c) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4), the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285-289, 471-473, 500, 510, 659, 1001-1008, 1010-1014, 1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1031, 1341-1344, 2314,2315. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *The adjustments in §2F1.1(b)(3) are alternative rather than cumulative. If in a particular case, however, both of the enumerated factors applied, an upward departure might be warranted.*

2. *"More than minimal planning" (subsection (b)(2)(A)) is defined in the Commentary to §1B1.1 (Application Instructions).*

3. *"Scheme to defraud more than one victim, "as used in subsection (b)(2)(B), refers to a design or plan to obtain something of value from more than one person. In this context, "victim" which a single telephone call was made to three distinct individuals to get each of them to invest in a pyramid scheme would involve a scheme to defraud more than one victim, but passing a fraudulently endorsed check would not, even though the maker, payee and/or payor all might be considered victims for other purposes, such as restitution.*

4. *Subsection (b)(3)(A) provides on adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.*

5. *Subsection (b)(3)(B) provides an adjustment for violation of any judicial or administrative order, injunction, decree, or process. If it is established that an entity the defendant controlled was a party to the prior proceeding, an the defendant ha knowledge of the prior decree or order, this provision applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business was previously enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, would be subject to this provision. This subsection does not apply to conduct addressed elsewhere in the guidelines; e.g., a violation of a condition of release (addressed in §2J1.7 (Offense Committed While on Release)) or a violation of probation *addressed in §4A1.1 (Criminal History Category)).*

6. *Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative lost produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of*

counts of conviction. See Chapter Three, Part D (Multiple Counts).

7. *Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, fo example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraus consisted of selling or attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the loss would be $40,000.*

There are, However, instances where additional factors are to be considered in determining the loss or intended loss:

(a) Fraud Involving Misrepresentation of the Value of an Item or Product Substitution

A fraud may involve the misrepresentation of the value of an item that does have some value (in contrast to an item that is worthless). Where, for example, a defendant fraudulently represents that stock is worth $40,000 and the stock is worth only $10,000, the loss is the amount by which the stock was overvalued (i.e., $30,000). In a case involving a misrepresentation concerning the quality of a consumer product, the loss is the difference between the amount paid by the victim for the product and the amount for which the victim could resell the product received.

(b) Fraudulent Load Application and Contract Procurement cases

In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtain a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. However, where the intended loss is greater than the actual loss, the intended loss is to be used.

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. IN such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.

(c) Consequential Damages in Procurement Fraud and Product Substitution Cases

In contrast to other types of cases, loss in a procurement fraud or product substitution case includes not only direct damages, but also consequential damages that were reasonably foreseeable. For example, in a case involving a defense product substitution offense, the loss includes the government's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or retrofitting the product so that it can be used for its intended purpose, plus the government's reasonably foreseeable cost of rectifying the actual or potential disruption to government operations caused by the product substitution. Similarly, in the case of fraud affecting a defense contract award, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable. Inclusion of reasonably foreseeable consequential damages directly in the calculation of loss in procurement fraud and product substitution cases reflects that such damages frequently are substantial in such cases.

(d) Diversion of Government Program Benefits

In a case involving diversion of government program benefits, loss is the value of the benefits diverted from intended recipients or uses.

(e) Davis-Bacon Act Cases

In a case involving a Davis-Bacon Act violation (a violation of 40 U.S.C. § 276a, criminally prosecuted

under 18 U.S.C. § 1001), the loss is the difference between the legally required and actual wages paid.

8. *For the purposes of subsection 9b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information. This estimate, for example, may be based on the approximate number of victims and an estimate of the average loss to each victim, or on more general factors, such as the nature and duration of the fraud and the revenues generated by similar operations. The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss.*

9. *In the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud), the offense level is to be determined in accordance with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.*

10. *In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:*

    (a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;

    (b) false statements were made for the purpose of facilitating some other crime;

    (c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;

(d) the offense endangered national security or military readiness;

(e) the offense caused a loss of confidence in an important institution;

(f) the offense involved the knowing endangerment of the solvency of one or more victims.

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

11. Offenses involving fraudulent identification documents an access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. Where the primary purpose of the offense involved the unlawful production, transfer, possession, or use of identification documents for the purpose of violating, or assisting another to violate, the laws relating to naturalization, citizenship, or legal resident status, apply §2L2.1 or §2L2.2, as appropriate, rather than §2F1.1. In the case of an offense involving false identification documents or access devices, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

12. If the fraud exploited vulnerable victims, an enhancement will apply. See §3A1.1 (Hate Crime Motivation or Vulnerable Victim).

13. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. §1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries

regarding currency transactions, for which §2S1.3 would be more apt, and false statements to a customs officer, for which §2T3, I likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state arson offense where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. Where the indictment or information setting forth the count of conviction (or a stipulation as described in §1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than §2F1.1. Otherwise, in such cases, §2F1.1 is to be applied, but a departure from the guidelines may be considered.

14. *"Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. §§20,656,657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required bo be registered, with the /Commodity Futures Training Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial*

interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

15. *An offense shall be deemed to have "substantially jeopardized the safety and soundness of a financial institution" if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.*

16. *"The defendant derived more than $1,000,000 in grass receipts from the offense," as used in subsection (b)(6)(B), generally means that the gross receipts to the defendant individually, rather than to all participants, exceeded $1.,000,000. "Gross receipts from the offense" includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. See 18 U.S.C. § 982(a)(4).*

17. *If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the "continuing financial crimes enterprise."*

18. *If subsection (b)(6)(A) or (B) applies, there shall be a rebuttable presumption that the offense involved "more than minimal planning."*

Background: This guideline is designed to apply to a wide variety of fraud cases. The statutory maximum term of imprisonment for most such offenses is five years. The

guideline does not link offense characteristics to specific code sections. Because federal fraud statutes are so broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity.

Empirical analyses of pre-guidelines practice showed that the most important factors that determined sentence length were the amount of loss and whether the offense was an isolated crime of opportunity or was sophisticated or repeated. Accordingly, although they are imperfect, these are the primary factors upon which the guideline has been based.

The extent to which an offense is planned or sophisticated is important in assessing its potential harmfulness and the dangerousness of the offender, independent of the actual harm. A complex scheme or repeated incidents of fraud are indicative of an intention and potential to do considerable harm. In pre-guidelines practice, this factor had a significant impact, especially in frauds involving small losses. Accordingly, the guideline specifies a 2-level enhancement when this factor is present.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or trust in government create particular social harm. A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not confirming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involved the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particulary high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(4)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103-322.

Subsection (b)(6)(A) implements, in a broader form, the instruction to the Commission in Section 961(m) of Public Law 101-73.

Subsection (b)(6)(B) implements the instruction to the Commission in Section 2507 of Public Law 101-647.

APPENDIX H

NOV. 25, 1997 TRANSCRIPT, 18-23, 7-54, 7-55

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR. 97-166

UNITED STATES OF AMERICA,
Plaintiff,

v.

RONALD H. BLACKLEY,

Defendant.

Washington, D.C.
November 25, 1997
10:00 a.m.

VOLUME 7 - A.M. SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE. C. LAMBERTH
UNITED STATES DISTRICT COURT JUDGE,
AND A JURY.

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[18]

THE COURT: All right.

MR. FAHEY: I think probably the instructions on the elements and the evidence the jury has heard is sufficient.

THE COURT: And 29?

MR. FAHEY: The same thing there, your Honor.

THE COURT: All right. And then 30 is a modification of the Red Book?

MR. FAHEY: Yes, to --

THE COURT: Of 2.51?

MR. FAHEY: Right, and to make specific reference to the three items at the top of page 35 of our instructions.

THE COURT: All right. All right, I'll come to that separately, because let's get through the elements. All right, then, then, let's -- having understood your position on all those, let me have Ms. Rowland now explain how you come at these elements instructions. You start with the statute, as well.

MS. ROWLAND: We start with the "Nature of the offense" charge, but to the extent that you're going to send the indictment back, this instruction may not be necessary.

THE COURT: Right. Okay. What's your number there?

MS. ROWLAND: Pardon me?

[19]

THE COURT: What number are you on?

MS. ROWLAND: I'm on -- it's page 5 at the bottom, defense instruction number 1 at the top.

THE COURT: Okay. All right. Well, let me go at it this way. What's the -- what's wrong with using this the way -- because they fairly closely follow David & Blackmoor. What's wrong with their approach here?

MS. ROWLAND: Overall?

THE COURT: Do you have any specific objection -- yeah.

MS. ROWLAND: To the false statements?

THE COURT: Any specific objection to their approach? And then I can take what additions you may have, like the good faith defense, but --

MS. ROWLAND: Yes. The overall -- the objection that I have to their overall approach is that, the way the indictment was drafted, it did charge all three prongs of the false statement statute.

And, as your Honor is aware, we take dispute with the fact that we can't understand, is Count 1 a concealment or is it a false representation? Is Count 2 a concealment or a false representation? And Mr. Blackley shouldn't be put in the position of having to determine what he's being charged with. The indictment should have stated it clearly.

THE COURT: Mm-hmm.

[20]

MS. ROWLAND: As the evidence has developed, it appears that the government is charging concealment in Count 1 and false representation in Counts 2 and 3. The elements of those two prongs of the false statement statute are different.

Under the concealment prong, there has to be a duty to disclose. There has to be -- you may receive an instruction stating what the law or regulation is that you are required to make a disclosure under. That doesn't exist under the false representation prong, but yet, on the false representations prong, omissions are not actionable under that part of the 1001 statute.

So I think it's important to differentiate among the counts as to what the elements of the offense are when you look a little bit more closely. And also, you've seen that we've

submitted unanimity instructions within each count. And again, this is a charging decision that the government made, that they included 11 payments within Count 1.

And the jury has to find that either one or some combination of those payments resulted in a violation of the reporting requirements of Form SF-278, and they have to do so unanimously. You can't have one juror thinking it's a $275 payment that's a violation and another one thinking it's a $10,000 payment. They have to agree on the same [21] payment or same combination of payments.

And then, again, the same unanimity instruction is required for them to determine that, on Count 1, that Mr. Blackley concealed, as opposed to made an affirmative false representation, and then the same would be true for Counts 2 and 3.

THE COURT: Right.

MS. ROWLAND: The government chose to charge this under all three prongs, and I believe the law in the Circuit is pretty clear that the last two prongs are actually one and the same.

So, to the extent that they've charged it in the alternative, the jury has to reach some sort of conclusion unanimously as to what the government's evidence showed.

THE COURT: All right.

MR. FAHEY: Your Honor, the starting point, of course, is the indictment, and that charges all three prongs. And it's hornbook law, of course, that when an indictment would have us -- suggests to us what the government's theory was, that somehow we are relying on one prong in Count 1 and different prongs in Counts 2 and 3, that's a defense theory.

That's not how the evidence went in, and that's not how we intend to argue it, and the jury could well find, as David & Blackmoor's instructions set forth and we have [22] submitted, that the government has sustained the charges in the indictment by relying on any one of the three prongs for any one of the three counts.

We do, however, agree that there has to be unanimity on which prong and what the facts underlying that prong are. So, at that level, we can agree, but we cannot pick and choose among the various prongs and try and tailor the instructions, as the defense would have us do, as to each of the counts.

THE COURT: Would that modify your government 26?

MR. FAHEY: Well, I'm not sure I see your Honor's point. I think, however, it would not need modification. The second sentence in paragraph 2, I think, deals with the need for unanimity in each count as to the statement that is false.

THE COURT: Right. All right, I'll adopt the government's proposed and give you great appellate issue.

MS. ROWLAND: Thank you, your Honor.

THE COURT: Now, in terms of your good faith, which is your number -- and I take that back. I don't want that on the record when this goes up.

(Laughter.)

THE COURT: Your good faith, I need to give, which is -- what's your number?

MR. FAHEY: It's their number 18, your Honor.

[23]

THE COURT: 18. Do you have any objection top that?

MR. FAHEY: No, not in this case, your Honor. I think it's appropriate.

THE COURT: All right.

MR. FAHEY: We do, however, object to their recently handed-up defense theory --

THE COURT: Theory of the case. Well, there needs to be some modification to that. I'll get to that in a minute.

Let me see if there are any others in your elements discussion that we've got to look at separately. I take it there are none.

MS. ROWLAND: Your Honor, could I ask for clarification on your ruling --

THE COURT: Right.

MS. ROWLAND: -- as to using government's instruction number 26? Is that limited to --

THE COURT: No, I'm talking about 20 through 26.

MS. ROWLAND: All right. You're going to use all of the government's instructions with respect to the false statements?

THE COURT: Right.

MS. ROWLAND: Your Honor, we would --

THE COURT: Except the -- I guess I've got to

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Docket No. CR. 97-166

UNITED STATES OF AMERICA,
Plaintiff,

v.

RONALD H. BLACKLEY,
Defendant.

Washington, D.C.
November 25, 1997
1:30 p.m.

VOLUME 7
AFTERNOON SESSION
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE
ROYCE. C. LAMBERTH
UNITED STATES DISTRICT COURT JUDGE,
and a jury.

[7-54]

fraudulent statement or representation.

You may find the defendant performed more than one of these acts through a single course of action. However, to render a guilty verdict you must unanimously agree on at least one of these three acts.

The first of these acts which satisfies the first element concerns the falsification, concealment or covering up by use of a trick, scheme or device a fact.

To falsify, conceal or cover up by use of a trick, scheme or device means any deliberate plan or course of action or any affirmative act or any knowing omission designed to deceive others by preventing or delaying the discovery of information.

The second act which satisfied the first element concerns the making of a false, fictitious, or fraudulent statement or representation.

A false or fictitious statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.

The third act which satisfies the first element concerns the making or using of any false writing or document knowing it contains a false, fictitious, or fraudulent statement or representation.

Making or using any false writing or document means to create, to bring into existence or to submit or to file some [7-55] type of form, report, or letter of any kind which is not true.

As explained immediately above, a false or fictitious statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.

The second element you must find beyond a reasonable doubt is that the defendant acted knowingly and willfully.

A person acts knowingly, as that term used in these instructions, if that person acts consciously and with awareness and comprehension and not because of ignorance, mistake, or misunderstanding or some other similar reason.

A person acts willfully, as that term is used in these instructions, when that person acts deliberately, voluntarily, and intentionally.

Someone's intent or knowledge ordinarily cannot be proved directly because there is no way of directly looking into the workings of the human mind, but you may infer the defendant's intent or knowledge from the surrounding circumstances.

You may consider any statement made or acts done or omitted by the defendant and all other facts and circumstances received in evidence which indicate the defendant's intent or knowledge.

You may infer, but you're not required to infer, that the person intended the natural and probable consequences of

* * * *

Office of Independent Counsel's Requested Jury Instructions,
Nos. 20-26 (filed Nov. 24, 1997)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 97-0166 (RCL)

UNITED STATES OF AMERICA,

v.

RONALD H. BLACKLEY,
Defendant.

UNITED STATES' PROPOSED JURY INSTRUCTIONS

The United States, by and through the Office of Independent Counsel, respectfully requests that, pursuant to Federal Rule of Criminal Procedure 30, the following proposed jury instructions be given during the Court's charge at the conclusion of trial. The United States further requests leave to offer such other and additional instructions as may become appropriate during the course of the trial or at the conclusion of the evidence.

Date: November 18, 1997

Respectfully submitted,

OFFICE OF INDEPENDENT COUNSEL
In Re Alphonso Michael (Mike) Espy

/s/ William F. Fahey
William F. Fahey
Counsellor to the Independent Counsel
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Government's Requested Jury Instruction No. 20

FALSE STATEMENTS --
THE CRIMINAL STATUTE

Each of the Counts in the indictment charge the defendant with violations of Title 18, United States Code, Section 1001 which during the relevant period provided that:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry ...

shall be guilty of an offense against the United States.

Government's Requested Jury Instruction No. 21

FALSE STATEMENTS -- THE ELEMENTS

The essential elements of the false statements statute, each of which the government must prove beyond a reasonable doubt are:

First: That the defendant (a) falsified, concealed, or covered up by a trick, scheme, or device a fact; (b) made a false, fictitious or fraudulent statement or representation; *or* (c) made or used a false writing or document containing a false, fictitious, or fraudulent statement or representation; and

Second: That in so doing, the defendant acted knowingly and willfully; and

Third: That the fact concealed, the false statement made, or the false document made or used was material; and

Fourth: That the fact concealed, the false statement made, or the false document made or used, was in connection with a matter within the jurisdiction of any department or agency of the United States.

Government's Requested Jury Instruction No. 22

FALSE STATEMENTS -- THE FIRST ELEMENT: CONCEALMENT OF FACT, FALSE STATEMENT, OR FALSE DOCUMENT

The first element that you must find beyond a reasonable doubt is falsification or concealment. To find the defendant guilty of violating this statute, you must find that for each count charged in the indictment, the defendant either:

a. falsified, concealed, or covered up by a trick, scheme, or device a fact; or

b. made a false, fictitious or fraudulent statement or representation; or

c. made or used a false writing or document containing a false, fictitious, or fraudulent statement or representation.

You may find that the defendant performed more than one of these acts through a single course of action. However, to render a guilty verdict, you must unanimously agree on at least one of these three acts.

The first of these acts which satisfies the first element concerns the falsification, concealment or covering up by use

of a trick, scheme or device a fact. To "falsify, conceal or cover up by use of a trick, scheme or device" means any deliberate plan or course of action, or any affirmative act, or any knowing omission designed to deceive others by preventing or delaying the discovery of information.

The second act which satisfies the first element concerns the making of a false, fictitious or fraudulent statement or representation. A "false or fictitious" statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.

The third act which satisfies the first element concerns the making or using of any false writing or document knowing it contains a false, fictitious or fraudulent statement or representation. "Making or using any false writing or document" means to create, to bring into existence, or to submit or to file some type of form, report, or letter, of any kind, which is not true. As explained immediately above, a "false or fictitious" statement or representation is an assertion which is untrue when made or when used and which is known by the person making it or using it to be untrue.

Government's Requested Jury Instruction No. 23

FALSE STATEMENTS – THE SECOND ELEMENT: KNOWINGLY AND WILLFULLY (AND PROOF OF STATE OF MIND)

The second element you must find beyond a reasonable doubt is that the defendant acted knowingly and willfully. A person acts "knowingly," as that term is used in these instructions, if that person acts consciously and with awareness and comprehension and not because of ignorance, mistake or misunderstanding or other similar reason.

A person acts "willfully," as that term is used in these instructions, when that person acts deliberately, voluntarily, and intentionally.

Someone's intent or knowledge ordinarily cannot be proved directly, because there is no way of directly looking into the workings of the human mind. But you may infer the defendant's intent or knowledge from the surrounding circumstances. You may consider any statement made or acts done or omitted by the defendant, and all other facts and circumstances received in evidence which indicate the defendant's intent or knowledge.

You may infer, but are not required to infer, that the person intended the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial. You should consider all the circumstances in evidence that you think are relevant in determining whether the government has proved beyond a reasonable doubt that the defendant acted with the necessary state of mind.

Government's Requested Jury Instruction No. 24

FALSE STATEMENTS -- THE THIRD ELEMENT: MATERIALITY

The third element that you must find beyond a reasonable doubt is that the fact concealed, the false statement made, or the false document made or used, was material.

A fact, statement or document is material if it is one that is capable of affecting the receiving government agency. The United States need not prove that the receiving government department or agency was in fact misled. The fact concealed, the false statement made or the false document made or used

must simply have the capacity to impair or pervert the functioning of the government department. Thus, reliance is not an issue and it is immaterial whether the fact concealed, the false statement made or the false document made or used actually affected the particular government agency.

Government's Requested Jury Instruction No. 25

FALSE STATEMENTS --
THE FOURTH ELEMENT:
WITHIN JURISDICTION OF
THE UNITED STATES

The fourth element that you must find beyond a reasonable doubt is that the fact concealed, the false statement made, or the false document made or used, was in connection with a matter within the jurisdiction of a department or agency of the United States.

It is not necessary that the government prove that the defendant knew that the fact concealed, statement or document was within the jurisdiction of a federal department or agency. This element is satisfied if you find that the fact was concealed from, the false statement made to, or the false document provided to a department or agency of the United States or any one of its officially designated representatives or agents.

Count 1 of the indictment charges the defendant with filing a false Public Financial Disclosure Report with the United States Department of Agriculture ("USDA"). I instruct you that the USDA is a "department of the United States."

Count 2 of the indictment charges the defendant with signing a false sworn declaration for submission to the USDA Office of Inspector General ("USDA OIG"). I instruct you that

the USDA OIG is an agent of the USDA and is, therefore, a "department of the United States."

Count 3 of the indictment charges the defendant with signing a false sworn declaration for submission to the United States Agency for International Development Office of Inspector General ("U.S. AID OIG"). I instruct you that the U.S. AID OIG is an agent of the U.S. AID and is, therefore, an "agency of the United States."

Government's Requested Jury Instruction No. 26

FALSE STATEMENTS -- UNANIMITY

Each of the counts in the indictment alleges one or more false or fraudulent statements. The government is not required to prove that all of the statements that are alleged in a particular count of the indictment are, in fact, false.

Each juror must agree with each of the other jurors, however, that the same statement or representation alleged in a particular count to be false, fictitious or fraudulent is, in fact, false, fictitious, or fraudulent. The jury need not unanimously agree on each such statement alleged, but, in order to convict on a particular count, you must unanimously agree upon at least one such statement as false, fictitious or fraudulent when knowingly made or used by the defendant.

Unless the government has proven at least one specific false or fraudulent statement to each of you, beyond a reasonable doubt, you must acquit the defendant of the charge in that particular count of the indictment.

[Certificate of Service omitted in printing]

APPENDIX I

MARCH 13, 1998 TRANSCRIPT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR. 97-166

UNITED STATES OF AMERICA,
Government,

v.

RONALD H. BLACKLEY,
Defendant.

Washington, D.C.
Friday, March 13, 1998
9:37 a.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE
ROYCE. C. LAMBERTH
UNITED STATES DISTRICT COURT JUDGE

* * * *

[11] did not want to talk to him about this case. There was separate counsel. He has gone -- he has bent over backwards -- not with my urging -- because I think he understands the importance when you are in a trial setting of separating that out. So I just do not see this as -- as an inference to be drawn from the information that I have.

I would just, with reference, going back to the whole issue of more than minimal planning, Mr. Fahey was talking about a whole range of different checks and different schemes. This is a charge that relates to omissions in one

financial disclosure form, and the characterization of the fact that this was a scheme involving a lot of different people, orchestrated for the $21,000, is, I don't think, a statement that's supported by the record in this case, Your Honor.

THE COURT: All right. I think the government is right on the more than the minimal planning, and I agree with the probation office and will adopt the two points for the more than minimal planning. I will also adopt the other parts of the probation office report over the government's objections, and the only question then remaining on the guideline issues would be the obstruction. As I said, I do think it is clear by a preponderance of the evidence that Mr. Blackley, Jr., committed perjury, and I think it is a closer question, then, of whether that's attributable to the

* * * *

[20] absolutely zero evidence of that. This money went into the checking account of Mr. Blackley, and it came within weeks of this $30,000 award, taxpayers' dollars, to Mr. Cochran, an individual who Mr. Blackley had represented historically. And this was nothing less than a payoff. And this is as despicable conduct as we have seen from a high government official.

If these guidelines do not take into account that kind of conduct, upward departures are appropriate. Mr. Hunt has so recommended. We feel that an upward departure of eight under the guidelines is appropriate.

MR. KRANTZ: Your Honor, I would like to start with Mr. Fahey's last comment first. He has said that Mr. Hunt has recommended an upward departure, and, in fact, Mr. Hunt, in his pre-sentence investigation report, has made it clear he is taking no position on this issue.

Your Honor, I have to start with what the charge is. As you know, this is a charge relating to false statements. Under the guidelines, there is a reference to only one guideline for this provision, and that guideline is the one that Mr. Hunt used. Certainly there are situations in which this Court could award an upward departure, but, Your Honor, you know this is done with great care because the sentencing guidelines relate to a structured system of sentencing. We noted in our material to you, upward departures in this [21] Circuit are awarded less than two percent of the time. So it's an unusual situation. And I think in the context of this case we have to look at several circumstances. One is, again, the accusation here, the indictment charges omissions from a financial disclosure statement. Your Honor, we have discussed this before in front of you, but omissions from a financial disclosure statement, you know, is dealt with under a regulatory scheme that has virtually nothing to do with criminal prosecution. Officials make mistakes on those forms all the time.

And we have just heard Mr. Fahey recharacterize what he said occurred at trial, and I want to talk about the Cochran situation. It is notable that Mr. Fahey did not talk about Mr. Fuller and the $20,000 of the $21,000 because, as we remember from the testimony, there was no issue in front of the Department of Agriculture with reference to Mr. Fuller. He was frozen into a subsidy system, and there is nothing that Mr. Blackley could have done there.

Now, with reference to Mr. Cochran, if we would review the entire record what we would see is this, and if you will recall, this is from the testimony of the government's own witnesses, that Mr. Cochran was receiving a certain amount of subsidy over a period of time. A decision had been made at the lower level to, in effect, reverse what the Department

of Agriculture had done for a number of years. Prior to the time [22] Mr. Blackley went to the Department of Agriculture, the process had started to reverse that decision, to restore the subsidy to the level it was at. As soon as Mr. Blackley got to the Department of Agriculture, and Mr. Fahey refused to acknowledge this, the first day at work he met with Mr. Kelley and issued a letter indicating he could no longer be involved in this matter.

And if you remember the testimony of Mr. Webber, his comment was that he was a professional in the Department of Agriculture. He indicated his decision had been made entirely on the merits, and supported the recommendation that came up before Mr. Blackley came to the Department of Agriculture.

The reliance on Mr. Von Garlem is a very interesting notion because Mr. Von Garlem in his testimony did not even remember, could not even identify Mr. Cochran, and there were serious questions about the credibility of Mr. Von Garlem's statement. And I think what it comes down to is this. If what Mr. Blackley is being accused of here, unrelated to his false statements, is asking that Cochran get a fair review in the Department of Agriculture, independent and removed from him, if that's the crime, it raises an interesting question about whether it's inappropriate, in effect, for Mr. Cochran to be denied a review on the merits simply because he had had some relationship with Mr. Blackley before he went to the Department of Agriculture.

[23] Now, I think we have come a long way to the notion of what an upward departure would be used for in this situation. Again, Mr. Blackley was charged with an omission on his financial disclosure form. There is nothing in the indictment that addresses the question of being deprived of the fair and honest services of a government official. There is

nothing about gratuity. This is a false statements case, and there is nothing in the indictment, there is nothing in the record that would rise to the level of saying that this is a case where there should be an upward departure.

Your Honor, what concerns me deeply --

THE COURT: You have two other counts. If this was just an unintentional oversight on the SF-278, as he still maintained, I take it, to the probation officer, you still have two other counts of lies to these IGs. So it's not just the 278.

MR. KRANTZ: Well, you're right, Your Honor, and I can certainly turn my attention there. Each of the statements made to the inspectors general went to the same question, which was relating to the financial disclosure information. And, Your Honor, there testimony --

THE COURT: But by that point there couldn't be any argument it was an unintentional oversight, could it?

MR. KRANTZ: Well, the answer to the question obviously, and I have to pull myself back from the process, [24] the trial itself. You know, Mr. Blackley has been convicted of those offenses --

THE COURT: I mean, the jury certainly found that.

MR. KRANTZ: That's right, but as you recall, there was a lot of testimony, and the jury may not have been persuaded by our argument about the issue of earned versus received --

THE COURT: Right.

MR. KRANTZ: -- because a lot of this money went to the question of what came before. So there still is an overlay in my view. And, again, the jury convicted, but about the characterization of these funds -- and I think, under that set of circumstances, when you take a look at the testimony as a

whole, how the witnesses handled both their direct and cross-examination, frankly, it seems to me that even with a jury conviction on these points, what we are talking about is false statements. And I don't think under the circumstances -- if the Court's concern is -- and I would understand this, Your Honor -- the misuse of high public office, in effect, in a way that threatens the integrity of the governmental process, like the Dean case, in effect, goes to the heart of somebody using that office. Your Honor, this is not that case. And there's enough pain inflicted here which -- without adding an upward departure. The facts here to not warrant it in this case, particularly, Your Honor, in light of the fact [25] that -- and I know that you've ruled on this before, which is -- the issue is that the Department of Justice has clear policy here by not even prosecuting, and I think while you determined that that's not a basis for selective prosecution, it certainly is the basis for thinking about sentencing in this case.

So, Your Honor, I urge the Court not to use an upward departure. The facts just don't justify it.

THE COURT: Thank you, Mr. Krantz.

Anything else you want to say, Mr. Fahey?

MR. FAHEY: Just briefly, Your Honor. I think the Dean case is highly instructive. The conduct by Deborah Gore Dean was very analogous to this situation, a high government official steering contracts to particular individuals. Here we have Mr. Blackley making sure that an application within his on department is granted, that is, the Cochran appeal, among others and it goes directly to the integrity of the governmental function. When we have individuals at his level making it clear that if you go in and you're either a friend of the high-ranking government official, or you pay them off, as in the

Cochran situation, you're going to get the result you want. That is a clear deprivation of honest services.

And one other point I think should be made here. The Webber testimony, and we have that here in court, Your Honor, he was asked -- Mr. Webber was asked by my colleague, [26] Mr. Coburn, how many appeals were granted during the time period you were there in the department, and he said something like five. How many of those were Mr. Blackley's? They were all Mr. Blackley's. These appellate decisions going in favor of the applicant at that high level were extraordinarily rare, except when Mr. Blackley was involved because Mr. Blackley used his power and his influence to make sure his friends were taken care of down in Mississippi. And as the evidence came out at trial -- and this is beyond the indictment. You know, we're well beyond the indictment. Mr. Krantz would like the Court to just look at the four corners there, but here at sentencing this Court is entitled to and should take into consideration the evidence. And the evidence at trial was that he influenced, Blackley influenced the Cochran appeal, and then he was paid for it. That is a deprivation of honest services. That goes to the heart of the need for and the importance of integrity in our governmental system.

THE COURT: All right.

MR. KRANTZ: Your Honor, I don't want to belabor this, but the characterization just made by independent counsel of what happened in the course of this trial raises for me another kind of concern that goes to this issue of upward departure. In its sentencing memorandum to this Court, independent counsel indicated to you that merely because this is an independent counsel case, there should be -- or there [27] can be different standards set; that you ought to consider

applying upward departures in a case simply because it's brought by the Office of Independent Counsel.

THE COURT: I'm not sure that was his argument, but if it was, I reject it.

MR. KRANTZ: Yes. Well, I may have misread it, but there is a sentence, and I will go back and pull it, that, in effect, I think can be attributed to that. And because of the -- again, Your Honor, you may disagree with my perspective about jurisdiction, but when you take a look at the nature of the charges in this case, I become very concerned that merely because the argument is being raised by an independent counsel office it is going to affect, or the suggestion is that it should affect your decision on upward departure. This is not the Dean case. In the Dean case, the Court said, in effect, the decision was made because she misused – it went to the heart of HUD, and the way she functioned in her office. The characterization now dealing with the Cochran matter, this one event, in which the testimony, I think, when you come down to Mr. Webber and all his grand jury testimony, the testimony of literally everybody involved in this event would suggest exactly to the contrary, that Mr. Blackley took relatively careful steps to try to make it clear that because he had gone to Washington and accepted a different position, he could not be involved. And the mere referral or asking a question [28] cannot, in effect, move this to a different guideline and bump up dramatically the punishment for this offense. I think that represents a serious departure in its own right. The Office of Independent Counsel -- I think, Your Honor, you have seen these people are not reluctant to file charges, and the most serious charges they can fine. If they thought they had a case relating to 1346, or to gratuity, or to any other serious offense, do you think they would have been cautious about charging those offenses? They charged the

offense as a false statement. That's what it is. Mr. Hunt has recommended what guideline should be used, and I think it's appropriate for this case.

THE COURT: All right. Well, I don't have to go as far as that to find that this is one of those very rare situations where a high level government official should have an upward departure. I think, under the guidelines, they do not fully capture the harmfulness and seriousness of the conduct in this case. I agree that there was no direct loss in this case, but the defendant was a high level government official who failed to disclose that he received at least $20,000 from people who had matters pending before the Department of Agriculture that fell within his purview. And the false statements themselves, without getting into what the consequences of those were, the false statements themselves by that high level government official are not adequately taken [29] into account by the guidelines, and so an upward departure of eight levels is appropriate I find in this case, and I will make an upward departure to total offense category, then of 16.

Mr. Hunt, then, if you can give me the guideline range on that, I'll make the appropriate findings.

MR. KRANTZ: Your Honor, if I may?

THE COURT: Yes.

MR. KRANTZ: Your Honor, if you remember the testimony of -- I believe it was either Mr. Spradlin (ph. sp.) or Mr. Kelly -- probably Mr. Spradlin -- it was that mistakes in the financial disclosure forms are common. They are consistently made, and there is an internal corrective process for doing that. Your Honor, if every public official -- because the 278 financial disclosure form has to be completed by every high level public official. That would mean that

everyone in that position would be entitled to hav an upward departure of eight merely because of the position --

THE COURT: No, that's not where I'm sentencing. I said in my comments to you what I found most troubling was, when the 278 question was raised, he lied twice to the IGs. You know, a simple mistake on a 278, even if it was being obscured, is one thing, but once you get called in by the IGs, you don't play the games he played and expect you're not going to get an upward departure, I think. I totally reject what

* * * *

[32] outstanding Motion for Judgment of Acquittal that the record -- that we may need to clear up the record on.

THE COURT: Yes.

MR. KRANTZ: That's correct.

THE COURT: All right.

MR. KRANTZ: Well, that's going to solve the case; right?

THE COURT: Are there any findings I need to make on that?

MR. FAHEY: I don't think so, Your Honor, and we would be prepared to submit on --

THE COURT: I thought there was nothing new that I hadn't considered.

MR. KRANTZ: Well, we had submitted our Motion for Judgment of Acquittal before, at the end of the government's case.

THE COURT: Right.

MR. KRANTZ: The Motion For Judgment of Acquittal which was in writing actually did summarize in, you know, more detail the various aspects of the evidence in the case. But it is true you have not ruled on that.

THE COURT: It's denied.

MR. KRANTZ: If we could take a short recess?

THE COURT: That's fine.

(Whereupon, a short recess was taken.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CR. 97-166

UNITED STATES OF AMERICA,
Government,
v.
RONALD H. BLACKLEY,
Defendant.

Washington, D.C.
Wednesday, March 18, 1998
9:44 a.m.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE
ROYCE. C. LAMBERTH
UNITED STATES DISTRICT COURT JUDGE

[2] **PROCEEDINGS**

THE DEPUTY CLERK: The United States v. Ronald Henderson Blackley, Criminal Case 97-166. Mr. Fahey, Mr. Coburn, and Mr. Harkrader for the United States; Mr. Krantz, Ms. Rowland, and Ms. Dewey for the defendant; Mr. McCoy for the Probation Office.

THE COURT: All right, Mr. Krantz, you may proceed.

MR. KRANTZ: Thank you, Your Honor.

On Monday, we filed a motion with the Court to reconsider its decision that there would be an upward departure of eight in this case. The Court said during the hearing last Friday that the guidelines did not capture the harmfulness and the seriousness of the conduct in this case;

that even though there was no loss, there was a failure to disclose $20,000 from people having business pending before the Department of Agriculture. You also then said, Your Honor, that false statements by high public officials were not adequately taken into account in the guidelines, and you reached the conclusion of an upward departure of eight, which would take this case from an eight to a 16, and from a possible sentence of probation to one of 21 to 27 months.

Your Honor, in my memorandum to the Court, I gave the following reasons, very quickly in summary, for the request that you reconsider.

I tried to convey, and obviously you've heard this [3] from me before, Your Honor, that although we in no way diminish the amount of $20,000, as we have tried to point out, virtually all of this money came from Charles Fuller, who had, in effect, no business pending before the Department of Agriculture about which any decision could be made.

We also tried in our memorandum to you to put the context of the statements made to the Inspectors General into context because you had indicated very clearly that it's not just Count 1, the Form 278 statements, but it was the fact that on two separate occasions false statements were made to Inspectors General.

Your Honor, what I wanted to convey in the memo which I did not have a chance to convey last Friday -- again, without in any way detracting from the fact that the jury convicted Mr. Blackley of making two false statements -- that it is important to, again, remember the context of these statements. With reference to the statement made to the Inspector General at the Department of Agriculture, Mr. Blackley had voluntarily produced all of his records. He made a 19-page

statement, and I think it was fairly clear during the evidence presented at the trial that virtually everything in that statement was accurately reflected. There was the reference, and obviously the key reference about whether something -- whether monies were earned after Mr. Blackley went to the Department of Corrections -- excuse me, the [4] Department of Agriculture, but there was a -- the background that is fairly important, as you may recall, is that Mr. Blackley tried to correct one aspect of that statement, to make the distinction between the reference of what was earned and when something was received.

I think, in looking at a false statement, although there is a question about, you know, how false a statement can be, I think when you look at this statement plus the statement made later on to the Inspector General at, you know, the other agency that, you know, is pertinent to this case, where the reference was: received nothing from Mr. Mitchell or anybody else. These do not reflect, in my view, Your Honor, the kind of devious, extensive, false statements, in effect, which go to the heart of what someone is, in effect, trying to do. The context in these cases were very different, and it needs to be remembered that Mr. Blackley was not even Espy's chief of staff anymore at that time.

So the first point I wanted to try to emphasize in our memorandum to you is, that I think that in thinking about the harmlessness and seriousness of the false statements, the context is important. The efforts that Mr. Blackley tried to make to cooperate with the investigation is important. I think it does go to the issue of how harmful or serious these matters are, and whether or not they, in fact, go beyond the guideline itself.

[5] The second point I tried to make, Your Honor, goes to the issue of whether this case falls outside the heartland of

the guidelines. What we tried to emphasize to you, and you knew this because you made this statement last Friday, that a situation in which an upward departure is made under the guidelines, the situations in which it has occurred are rare. Less than one percent of the cases. It was your observation, Your Honor, that this may be a case where an upward departure is warranted because the Sentencing Commission may not have taken a false statement by a public official into account when it developed the fraud guideline.

What we tried to convey to you in our memorandum is, it looks to us like the Sentencing Commission thought about public officials in sentencing with great care and careful consideration. It specifically dealt with increases for sentence offense characteristics as it related to gratuities and deprivation of honest services. It specifically dealt with the issue of abuse of public trust. It dealt with the issues in the conflict guidelines. In the departures area, it gave a number of different examples. It opted not to refer specifically, again, to public officials.

So it was our position, as we reviewed the guidelines with great care, that the Sentencing Commission had, in fact, decided those areas in which departures or increases were appropriate, and they seem to relate [6] specifically to where there was an abuse of office, such as, an acceptance of a gratuity or abuse of public trust. And that was not the charge in this case. So our assessment of these guidelines is, the Commission, after considering the variety of circumstances, decided not to add any specific reference in the fraud area simply because someone is a public official.

We also, Your Honor, very quickly, after Friday's hearing looked at the case law, and we have to start with the *Williams* case, the Supreme Court case which makes an

assessment about departures and looks at a standard of reasonableness.

We have not, Your Honor, found any case where an upward departure was given under circumstances anything like this one. We have talked about the *Dean* case before, and so has the independent counsel. The *Dean* case is simply not applicable to this situation.

We then looked with care at upward departure cases to find if there were any analogies that would apply here, and the cases we cited to you, Your Honor, include *Childress* and *Root*, where Courts have upwardly departed when they have found things like disruption of governmental function or extensive activities, criminal activities that may go beyond the guideline. But even in the cases we cited to you, Your Honor, and we could not find anything like this, the typical [7] reference might be for an increase of two as an upward departure. And we could find nothing, no precedent which would get to what the Court has decided to do in this case, an upward departure of eight.

Now, Your Honor, I want to come back to where I began, which is the impact of this case of an upward departure of eight. This does take the case from an eight itself, provides this Court with an opportunity to give probation. If you take it to a 16, obviously we're talking about a range from 21 to 27. We believe, based upon the facts of this case, the circumstances I've just described, that an upward departure of eight is simply not warranted. We can assure you that there has been tremendous punishment and deterrence already. It's something we will be talking about later this morning. But we do not think there is precedent or reason for this Court to depart in the way it has indicated it would last Friday, and we respectfully ask the Court to

reconsider its decision based upon the memorandum we provided to you.

THE COURT: All right. Thank you, Mr. Krantz.

Mr. Fahey.

MR. FAHEY: Your Honor, first of all, let me note that we were not served with the Motion for Reconsideration that was, as I just learned, apparently filed this past Monday. But, nevertheless, I'm prepared to respond today.

I think the first thing I would like to point out is [8] that these arguments have been advanced in different address, shall we say, by the defense: in multiple pleadings before last Friday, and then, of course, some of these arguments we heard last Friday. But let me take them in the order that counsel presented them.

First of all, he argues, once again, and this was a theme throughout the trial, in pre-trial motions, and certainly as recently as last Friday, that Mr. Fuller had no business before the USDA. Of course, the indictment alleged that Fuller had substantial matters pending, was receiving tens of thousands of dollars on government programs, and he -- at the same time Fuller was paying the defendant tens of thousands of dollars, we could argue, and I think we suggested to the jury, for access and to make sure that these programs remained in place and would not be changed. But we are beyond that at this point. The jury has concluded that the false statements that the defendant made in covering up his payments from Fuller and Cochran were substantial, and these resulted in the conviction of the defendant on all three of the charges.

Mr. Krantz, again, reargues the evidence with respect to Counts 2 and 3, suggesting that somehow the lies to investigating agents were not big lies, were not serious lies.

Well, that's not what the jury found, Your Honor, and I don't know of anything in 18 U.S.C. 1001, or in the case law, that [9] differentiates between big lies and little lies, and when we're talking about a government official who is receiving money from individuals, businesses with matters before the department, I think that's not a distinction that ought to be agreed to by the Court, and certainly the jury in its verdict did not so differentiate.

Mr. Krantz suggested the conduct of the defendant was not devious. Well, again, Your Honor, this is an attempt to undercut the jury's verdict. The jury clearly said that the defendant lied, not on one occasion, not on two occasions, ~~but~~ on three occasions, and covered up his receipts of monies from individuals with matters before the department. This was devious conduct. And his attempts to go back and recast -- Mr. Krantz's attempts to go back and recast the evidence here, I think, come too late in the day.

Although we heard the term heartland, I think, today for the first time, and perhaps the Court heard it on -- if you reviewed the motion that was apparently filed on Monday, Mr. Krantz made a heartland argument last Friday when he indicated that this was a case that an upward departure was not appropriate because he felt that the guidelines, under 2(f)1.1, contemplated the conduct that Mr. Blackley was convicted of. I think Your Honor made appropriate and careful findings last Friday with respect to the need for and the importance of an upward departure, and we think those findings [10] made by the Court last week were unassailable and ought to be followed today.

And, finally, Mr. Krantz today makes the argument that he could find no case where there was an upward departure absent an obstruction of governmental function. But, of course, we had that in this case. The Cochran example is,

perhaps, in the years I've been prosecuting corruption cases, the most startling example of an obstruction of a governmental function, when you have the second most powerful official in an agency reaching down and intervening on a matter before the department, an appeal that implicated tens of thousands of dollars, got the result he wanted, and then was paid off $1,000 within a matter of weeks. That is an obstruction of a governmental function, and to the extent that Mr. Krantz has found cases that contemplate and agreed to an upward departure in circumstances like that, we would adopt those cases and feel that they do apply here.

I will submit on this Motion for Reconsideration, Your Honor.

THE COURT: All right.

MR. KRANTZ: I just have two comments, Your Honor. I just want to briefly comment, Your Honor, with reference to not receiving what we filed. At the very top it says "Supplemental Sentencing Memorandum," and we did make it -- as far as I know, it was sent on the same -- at the same time we [11] sent it to you.

I apologize if you did not receive it, Mr. Fahey.

I just wanted to make two very quick responses to Mr. Fahey. I tried to underscore that I am not saying -- I'm not trying to excuse behavior with reference to false statements. I was making a different point, which is, the fraud guidelines specifically has a punishment for a false statement. I was trying to simply point out that the type of false statement here -- no false statement is appropriate -- does not, in and of itself, require that you upwardly depart eight. And it's at that point that, it seems to me, you can make an assessment about the nature of what was done.

Your Honor, the characterization of Mr. Fuller's and Mr. Cochran's business before the Department of Agriculture, I guess we have now talked about it enough, and the Court is well aware of the facts of the case. But the characterization that what happened in Mr. Cochran's situation is about the worst thing that has been seen in years by Mr. Fahey again fails to point out that Mr. Blackley specifically withdrew from consideration, that the decision about Mr. Cochran's case, the process of setting that aside began before Mr. Blackley ever step foot in Washington; that Mr. Fuller's subsidies had been pre-set and could not be adjusted. And, I think, again, I -- you know, the jury responded to this case. The issue before this Court now really goes to the question of [12] upward departure, outside of what the guidelines have now set for punishment.

Thank you, Your Honor.

THE COURT: All right. Well, I find that the defendant clearly continued to receive monies from businesspeople from whom the U.S. Department of Agriculture provided subsidies during his employment at USDA, although he was informed that he was not allowed to receive such payments. The defendant not only received them, but he also lied about the fact that he had received them. Moreover, the defendant was in a high government position as Chief of Staff to the Secretary of Agriculture when he received these monies.

I find that this is a factor not considered in the fraud section of the guidelines. Contrary to the defendant, I don't think the Commission ever made a deliberate decision not to include this factor; I think they didn't deal with it at all, and, in this Court's view, an eight-level upward departure is appropriate.

In my view, providing a false statement under oath is a serious offense. The fact that proceeding is civil or administrative does not make the crime less serious. We cannot fairly administer any kind of system of justice in this country if we do not penalize those who lie under oath.

A lawyer, who must have been on another planet -- no, not actually, he was just from Hollywood -- recently [13] claimed on national television that no one is ever prosecuted for false statements under oath in a civil proceeding. I thought at the time that he should tell that to Dr. Jeffrey Goltz, who is currently serving a term in federal prison after he pled guilty to me this year for making false statements under oath. And Dr. Goltz got a break to which this defendant is not entitled-he pled guilty and received credit for acceptance of responsibility.

The defendant stands before me as a high ranking government official convicted of making false statements under oath. This is such a serious crime that it demands an even longer term of imprisonment in this Court's view. This Court has a duty to send a message to other high level government officials, that there is a severe penalty to be paid for providing false information under oath. There is a strong reason to deter such conduct, and to dispel all the nonsense that's being publicly discussed and debated about the seriousness of lying under oath by government officials. A democracy like ours depends on people having trust in our government and its officials.

The abuse of trust placed on this defendant was egregious. The defendant's conduct about his receipt of monies while he was Chief of Staff to the Secretary of Agriculture should be an embarrassment to him, as well as to the Administration that he served.

[14] I do not find that the Sentencing Commission took into account high level government officials' conduct in enacting those fraud guidelines, and I find that an eight-level upward departure is appropriate in order to stress, as a deterrent to other government officials, the Court's view of the seriousness with which this crime should be viewed by all.

Based on that, then, we will move to any argument you would like to make on sentencing within the guideline range.

MR. KRANTZ: Your Honor, I believe that Mr. Hunt's pre-sentence investigation report, and the large number of letters that were attached to that report, reflect the kind of person that Ronald Blackley has been and is.

I would like to begin by observing that Mr. Blackley was an unusual public official in this Administration. He didn't go to Harvard. He did not study abroad. He does not even have a college degree. He is not part of the inside of the beltway establishment.

Ron Blackley grew up poor in Mississippi in the Delta, and he made his way through grit and hard work. He has never made much money in his life, and it didn't matter to him. Ron Blackley has dedicated his life to helping farmers, particularly small farmers. Your Honor, if you look at some of the letters that were attached to our memorandum, you will find a letter from Elijah Lewis, who is a poor farmer [15] in Mississippi, and he that unlike everybody else he had to deal with through the federal establishment, Ron Blackley helped him save his farm against an unfeeling government, and he didn't even charge him anything for the service.

Your Honor, Ron Blackley was thrilled to come to Washington, to work at the Department of Agriculture for this reason: He had a sense that the Department was simply not responsive to farmers' concerns, not only in Mississippi but

in other places. If you had a chance to look at the letters from Charles Dunkin, Rasheed Nuri, Cindy Sheeley, Larry Burn (ph. sps.), people who interacted with Ron when he was here, they demonstrate how hard he worked and the kind of respect there was for him, his work ethic, and, yes, his integrity and his commitment to the job.

Certainly, Ron Blackley had opponents. There were people at the Department of Agriculture who cared more about protecting their turf than about helping farmers. And I must also say that Ron Blackley has rough edges, and there are ways that he clearly would irritate people in the Department of Agriculture, and I'm sure that that occurred.

But in the very few months that I have had an opportunity to be involved with Mr. Blackley, as have the two lawyers sitting there with him, we've learned a lot about him. We've learned about his commitment to children and his community when he was living in Mississippi, his tireless [16] efforts on behalf of kids to make sure that they had good opportunities growing up to be involved in sports. And I found out in one trip I made to Mississippi there could have been hundreds of letters from people who live in that community about what Ron Blackley has meant to people there.

And I can tell you, Your Honor, that we understand your concern about public officials and the responsibilities they have to the public. And I can only tell you, again, that Ron Blackley shares this view about the standard that ought to be set for public officials. He clearly thought he had taken a number of steps before he came here through his terminations of his relationships with businesses, the letters he wrote to people when he got to the Department of Agriculture. And, again, the government has never charged Ron Blackley with misusing his office, and I don't think that was established any way at all during the course of the trial.

Now, I want to point out to this Court again that Ron Blackley does not minimize the false statement charges. He has been convicted by a jury. And as he told Mr. Hunt, he deeply regrets not having taken the additional time to seek help in making sure that the forms were properly completed, and in making sure that he in no way misled the Inspectors General investigators during their investigation. And he's clearly, also, very sorry about any harm he may have caused by the mistakes that he made. I'm not going to, again, dwell [17] upon the complicated nature of the financial disclosure statement forms or the other background, except to try to go on record to say that this is not conduct that in any way Mr. Blackley intended to take advantage of his position at the Department of Agriculture, but he does regret what has occurred.

But what I would like to focus just a moment or two on, Your Honor, is this: This entire experience, the investigation that has gone on for a long period of time, the trial and conviction, has had a devastating impact on Ron Blackley's life and on that of his family. The disruption to Ron's family started when he came up from Mississippi on his own and worked his 18-hour days when his family was still behind. The humiliation that has been caused by the on-going investigation to Ron, his family, his friends and business colleagues, simply cannot be forgotten. And, again, even if people are convicted of offenses -- and I think that this is something that is unclear to those who may not be caught up in the independent counsel or any other kind of long-term investigation -- the toll on families as matters get sorted out and resolved is incredible.

I might also add, and I am, unfortunately, one of the people who practices law in this town, the cost, the sheer legal costs of trying to defend yourself during the course of an

investigation at a trial is just beyond belief. Ron [18] Blackley has lost his job. He is not working at this moment. He is barely able to keep his family afloat. His family has now relocated up here. The pre-sentence investigation report reflects very clearly what his assets are. Ron also has added responsibility for elderly, you know, parents, members of the extended family.

And, Your Honor, this is kind of a simple added point, but not necessarily to people who grew up in the Mississippi Delta, as a convicted felon, Ron is going to be prevented from doing something that's very much at the heart of his life down there, which is, you know, people like to go duck hunting. There are simple pleasures that people take in life, and conviction as a felon has an impact that goes well beyond some of the things I have talked about.

In short, Ronald Blackley has suffered incredible pain. The life of this decent man and his family will never be the same. And while public officials, Your Honor, should be measured by a very high standard -- and, again, I'm not disagreeing with the point you've made here -- I think the punishment should fit the crime.

To paraphrase Thomas Jefferson: If punishment is proportion to the injury, mid would feel if their inclination as well as their duty to see the law observed. If punishment is disproportionate to the crime, it raises questions about the legitimacy of the administration of justice and its [19] fairness.

And there are a lot of messages that will come out of this courtroom, Your Honor. I mean, some affect Ron Blackley directly, as they have to. But you have made an observation which is clearly understandable, that people who go into public service have to understand the high standards that are

set. But, Your Honor, there is another thing that has to be considered, which is, with all the coverage of this federal government, there obviously is concern among young people about decisions to go into public life and whether it is worth it, whether the risks are too high. And just as it is important for you to think about deterrence, sending out a message about a disproportionate punishment may have very adverse consequences on the willingness of people we need in public service to take that risk.

So I stand before you here making the request that you take all of this into account when you decide on this sentence for Ron Blackley. It relates not only to the term you would give within the guideline you have suggested, but any other sanctions, such as a question of fine. Here is a man now who never had much to begin with, who has been stripped virtually of everything he has, and I do not think, under the circumstances, that a fine is warranted.

So I want to tell you that, as I close with these observations, that Ron Blackley is here before you, and on his [20] behalf I am asking you to take these into consideration, take these observations as you arrive at the sentence you are about to give.

Thank you, Your Honor.

THE COURT: All right.

MR. FAHEY: Your Honor, now that we are at the time for imposition of sentence, I think there are several things that have crystallized and are abundantly clear.

This is a case about the abuse of a position of trust, where the second most powerful individual at the United States Department of Agriculture abused his position to make money and to help his friends. Secondly, there has been absolutely no

remorse in this case. There is no acceptance of responsibility. We hear time and again denials and attempts to trivialize the seriousness of the charges.

In the Sentencing Memorandum filed by the defendant and today by counsel, we hear that perhaps Mr. Blackley should have sought additional time for the SF-278. Maybe he should have sought additional help. That's denial. That's a lack of remorse. That's a failure to accept responsibility for his own actions.

The defendant was involved in a cover-up in this case-not once but three times. He lied on his federal form, a form that individuals routinely, throughout this government, public servants, all good and honest servants, routinely file [21] and do not lie on, do not cover-up on, but the defendant did so. And then he did twice more when he had an opportunity to straighten out the record. Once to officers of the Inspector General of his own agency, and once to the agents and officers of the Inspector General of the new agency that provided employment at the tune of about $120,000 a year. It was good employment. But, nevertheless, the defendant, when he had the opportunities to right the wrong, chose to go the other way.

Public service is a public trust. It is not a way to make money on the side, and we agree with the Court's inclination, that it is important to send a message to other public officials who would trivialize the importance of these conflict of interest forms, the importance of telling the truth, and the importance of telling the truth to government agents who are investigating other crimes.

The defendant has adopted several themes in his sentencing memorandum and in the argument of counsel today, and I would like to touch on those briefly. First, there

is the theme that the defendant is a man of integrity and honesty. Well, the jury found otherwise.

Second, there is a suggestion made today which is, frankly, somewhat offensive, that individuals within the Department of Agriculture were somehow protecting their turf, and as a result Mr. Blackley stands convicted before this Court. There was no evidence whatsoever of that during the [22] course of this trial, Your Honor. And, indeed, as Mr. Spradlin and others said, a number of people fill out these forms all the time. They don't lie on them. If they're confused, they ask questions. The defendant had an opportunity to ask questions. He never disclosed -- and we asked Mr. Spradlin that and we asked Mr. Kelley that, all these officials who are there to help him -- not once did Mr. Blackley say, "By the way, I'm taking $20,000 from Mr. Fuller, and these checks are on different accounts. Some are made payable to my wife, and some are made payable to my son, and some are made payable to me. And, by the way, I took a thousand dollars and put it in my checking account after Mr. Cochran's appeal was granted, and after I asked Mr. Webber and Mr. Von Garlem to look at that."

The defendant has come in with a host of character witnesses and letters, Your Honor, and I think while they're generally well-intentioned, and they knew Mr. Blackley and some of his other life activities, whether it's sports with children in Mississippi or occasional job contact up here in Washington, they did not know about the facts of this case. On the other hand, the jury did, and the jury found that the defendant lied on three occasions when he tried to cover up his receipts of these monies from these officials of these businesses who had matters before the Department.

Some of these witnesses are apparently biased. For [23] example, Mr. Lane is an attorney down in Mississippi, and he

writes a very nice character letter to the Court and asks for the Court's consideration. But Mr. Lane represents Mr. Cochran. Mr. Cochran is the fellow that paid off Mr. Blackley. And to the extent that Mr. Lane can help the Defendant Blackley and keep him out of jail, or reduce his exposure, perhaps that will enure to Mr. Cochran's benefit because Mr. Blackley won't cooperate against Mr. Cochran. Mr. Lane was also a business associate of Mr. Blackley's, and he has a bias in that regard.

Counsel referred today to a Mr. Lewis, a farmer down in Mississippi. Well, we interviewed Mr. Lewis, and he said, and I quote, on November 17th, 1997, he called Blackley once in Washington to ask for help with a Farmer's Home Administration loan problem, but Blackley said he was unable to help with that loan problem. So there's a conflict even with respect to that character witness.

Counsel today indicated that Mr. Blackley came to Washington to serve and to help farmers, poor farmers. Well, not to put too fine a point on it, when Mr. Blackley came to Washington, he tripled his salary and he had a position of high power within the government, and he abused that power. This is not a man who altruistically came to Washington to serve. He was there, in part, and, perhaps in the majority of instances, to help himself.

[24] We heard an argument today, and it was something that was written in the Sentencing Memorandum, again, which is extraordinarily troubling, Your Honor, which is that somehow, if appropriate punishment is meted out by this Court in response to the conduct that Mr. Blackley has been convicted of, we are somehow going to deter good, young people from going into public service. I'm, frankly, somewhat appalled by that argument. I think the opposite message should go out, that we need good, young, honest people in

public service, people who are not here to line their pockets, people who know the difference between telling the truth and not telling the truth. And I think this Court can send a message today that if you have a preference and predilection for not telling the truth, you should not be in public service. This country deserves -- and Mr. Blackley has proven the opposite -- but this country deserves good, honest, young people in government service, and we should encourage that.

Mr. Blackley has made the point time and again that there was no linkage between his conduct and the payoff he received from Mr. Cochran. And I think we have put to rest that argument, Your Honor, and I would just ask the Court to keep in mind the testimony of Von Garlem and Webber.

Ultimately, Your Honor, standing before you in the person of the defendant is an individual who tried to cut the corners. He tried to be clever. He tried to get monies from [25] outside businesses after he came to the defendant and he was making a substantial salary. He tried to cover that up on three occasions when he was discovered. And now that it is time to come before the Court and be sentenced through his counsel, he expresses a remorse, but, indeed, it seems that it's more a remorse of having been caught, not a remorse for having conducted the illegal activities at the first instance.

So with all that in mind, Your Honor, we would respectfully submit that a sentence at the high end of the guideline range is appropriate to send the appropriate message to others who would like in a position of high government -- in a high government positions, and individuals who would take money to which they are not entitled.

We'll submit the matter.

THE COURT: All right. Thank you, Mr. Fahey.

Anything further you want to say, Mr. Krantz, before I ask the defendant to speak?

MR. KRANTZ: No, Your Honor.

THE COURT: All right. Mr. Blackley, then, if you would come forward.

I know you would be nervous at a time like this, but if you would like to say anything on your own behalf before I impose sentence, you certainly may.

DEFENDANT BLACKLEY: Yes, Your Honor. I would like to say how much I appreciate my wife standing with me during [26] all this, my mother, friends that have been in the courtroom pretty much day after day.

I have always strived to do the best I could, and by doing that it meant helping people, being considerate to their needs. There's indication that I haven't accepted responsibility. I have always accepted responsibility for the actions that I have taken. There was a disagreement between myself as a defendant and the prosecution towards these statements. I would like to point out, Your Honor, that the statement signed for the USDA, independent counsel, IG, was over a six-month period of questions and answers, and all of them put together by the IG, and I made a correction, and made some after it was typed. The statement signed with the US AID IG had to do with a particular interest in Mississippi and my involvement. To the best of my knowledge, I clearly responded to the questions asked of me, and remembering the questions asked, and considered that the statement to be true. I still consider the statements to be true.

I considered that I did all that I could to honestly do my job, and I want you to know that I do accept full responsibility. I accept the jury verdict, and because of that

we're here today. I appreciate your time and consideration in this matter. Thank you.

THE COURT: Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant, [27] Ronald Henderson Blackley, is hereby committed to the custody of the Bureau of Prisons for a term of 27 months on Counts 1 through 3, to be served concurrently.

The sentence is an upward departure based on the defendant's position as a high government official, a fact not considered by the fraud section of the guidelines. Pursuant to Part C of the sentencing guidelines, offenses involving high government officials receive an eight-level increase. an eight-level increase provides for a base offense level of 16, and a guideline range of 21 to 27 months.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years on Counts 1 through 3, to be served concurrently. Within 72 hours of your release from custody of the Bureau of Prisons, you shall report in person to the probation office in the district to which you are released.

While on supervised on release, the defendant shall not commit another federal, state, or local crime, shall abide by the standard conditions of supervised release adopted by the probation office, and shall comply with the following special conditions:

One, the defendant shall not possess a firearm or other dangerous weapon for any reason, and;

Two, the defendant shall not seek, nor shall he obtain employment with the U.S. Government during his term of

* * * *

APPENDIX J

GUIDELINES MANUAL

Chapter 1 - Introduction and General Application Principles

PART A -INTRODUCTION

1. *Authority*

The United States Sentencing Commission ("Commission") is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

The guidelines and policy statements promulgated by the Commission are issued pursuant to Section 994(a) of Title 28, United States Code.

2. *The Statutory Mission*

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

The Act contains detailed instructions as to how this determination should be made, the most important of which directs the Commission to create categories of offense behavior and offender characteristics. An offense behavior category might consist, for example, of "bank

robbery/committed with a gun/$2500 taken." An offender characteristic category might be "offender with one prior conviction not resulting in imprisonment." The Commission is required to prescribe guideline ranges that specify an appropriate sentence for each class of convicted persons determined by coordinating the offense behavior categories with the offender characteristic categories. Where the guidelines call for imprisonment, the range must be narrow: the maximum of the range cannot exceed the minimum by more than the greater of 25 percent or six months. 28 U.S.C. § 994(b)(2).

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. The Act also abolishes parole, and substantially reduces and restructures good behavior adjustments.

The Commission's initial guidelines were submitted to Congress on April 13, 1987. After the prescribed period of Congressional review, the guidelines took effect on November 1, 1987, and apply to all offenses committed on or after that date. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after

submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p).

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. *The Basic Approach* (Policy Statement)

To understand the guidelines and their underlying rationale, it is important to focus on the three objectives that Congress sought to achieve in enacting the Sentencing Reform Act of 1984. The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court.

Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar

offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

Honesty is easy to achieve: the abolition of parole makes the sentence imposed by the court the sentence the offender will serve, less approximately fifteen percent for good behavior. There is a tension, however, between the mandate of uniformity and the mandate of proportionality. Simple uniformity – sentencing every offender to five years – destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad.

A sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect. For example a bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warmed), injured seriously (or less seriously), tied up (or simply pushed) a guard, teller, or customer, at night (or at noon), in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time.

The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise

identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.

The larger number of subcategories of offense and offender characteristics included in the guidelines, the greater the complexity and the less workable the system. Moreover, complex combinations of offense and offender characteristics would apply and interact in unforeseen ways to unforeseen situations, thus failing to cure the unfairness of a simple, broad category system. Finally, and perhaps most importantly, probation officers and courts, in applying a complex system having numerous subcategories, would be required to make a host of decisions regarding whether the underlying facts were sufficient to bring the case within a particular subcategory. The greater the number of decisions required and the greater their complexity, the greater the risk that different courts would apply the guidelines differently to situations that, in fact, are similar, thereby reintroducing the very disparity that the guidelines were designed to reduce.

In view of the arguments, it would have been tempting to retreat to the simple, broad category approach and to grant courts the discretion to select the proper point along a broad sentencing range. Granting such broad discretion, however, would have risked correspondingly broad disparity in sentencing, for different courts may exercise their discretionary powers in different ways. Such an approach

would have risked a return to the wide disparity that Congress established the Commission to reduce and would have been contrary to the Commission's mandate set forth in the Sentencing Reform Act of 1984.

In the end, there was no completely satisfying solution to this problem. The Commission had to balance the comparative virtues and vices of broad, simple categorization and detailed, complex subcategorization, and within the constraints established by that balance, minimize the discretionary powers of the sentencing court. Any system will, to a degree, enjoy the benefits and suffer from the drawbacks of each approach.

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. As a practical matter, however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

The Commission's empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make if difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have,

in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.

The Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis would help eliminate disparity because the data represent averages. Rather, it departed from the data at different points for various important reasons. Congressional statutes, for example, suggested or required departure, as in the case of the Anti-Drug Abuse Act of 1986 that imposed increased and mandatory minimum sentences. In addition, the data revealed inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Despite these policy-oriented departures from pre-guidelines practice, the guidelines represent an approach that begins with, and builds upon, empirical data. The guidelines will not please those who wish the Commission to adopt a single philosophical theory and then work deductively to establish a simple and perfect set of categorizations and distinctions. The guidelines may prove acceptable, however, to those who seek more modest, incremental improvements in the status quo, who believe the best is often the enemy of the good, and who recognize that these guidelines are, as the Act contemplates, but the first step in an evolutionary process. After spending considerable time and resources exploring alternative approaches, the Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.

4. *The Guidelines' Resolution of Major Issues* (Policy Statement)

The guideline-drafting process required the Commission to resolve a host of important policy questions typically involving rather evenly balanced sets of competing considerations. As an aid to understanding the guidelines, this introduction briefly discusses several of those issues, commentary in the guidelines explains others.

(a) *Real Offense vs. Charge Offense Sentencing*

One of the most important questions for the commission to decide was whether to base sentences upon the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted ("real offense" sentencing), or upon the conduct that constitutes the elements of the offense for which the defendant was charged and of which he was convinced ("charge offense" sentencing). A bank robber, for example, might have used a gun, frightened bystanders, taken $50,000, injured a teller, refused to stop when ordered, and raced away damaging property during his escape. A pure real offense system would sentence on the basis of all identifiable conduct. A pure charge offense system would overlook some of the harms that did not constitute statutory elements of the offenses of which the defendant was convicted.

The Commission initially sought to develop a pure real offense system. After all, the pre-guidelines sentencing system was, in a sense, this type of system. The sentencing court and the parole commission took account of the conduct in which the defendant actually engaged, as determined in a presentence report, at the sentencing hearing, or before a parole commission hearing officer. The commission's initial efforts in this direction, carried out in the spring and early

summer of 1986, proved unproductive, mostly for practical reasons. To make such a system work, even to formalize and rationalize the status quo, would have required the Commission to decide precisely which harms to take into account, how to add them up, and what kinds of procedures the courts should use to determine the presence or absence of disputed factual elements. The Commission found no practical way to combine and account for the large number of diverse harms arising in different circumstances; nor did it find a practical way to reconcile the need for a fair adjudicatory procedure with the need for a speedy sentencing process given the potential existence of hosts of adjudicated 'real harm" facts in many typical cases. The effort proposed as a solution to these problems required the use of, for example, quadratic roots and other mathematical operations that the Commission considered too complex to be workable. In the Commission's view, such a system risked return to wide disparity in sentencing practice.

In is initial set of guidelines submitted to congress in April 1987, the Commission moved closer to a charge offense system. This system, however, does contain a significant number of real offense elements. For one thing, the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language. For another, the guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.

The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the

potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. Of course, the defendant's actual conduct (that which the prosecutor can prove in court) imposes a natural limit upon the prosecutor's ability to increase a defendants sentence. Moreover, the Commission has written its rules for the treatment of multicount convictions with an eye toward eliminating unfair treatment that might flow from count manipulation. For example, the guidelines treat a three-count indictment, each count of which charges sale of 100 grams of heroin or theft of $10,000, the same as a single-count indictment charging sale of 300 grams of heroin or theft of $30,000. Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through use of its departure power. Finally, the Commission will closely monitor charging and plea agreement practices and will make appropriate adjustments should they become necessary.

(b) *Departures.*

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar

Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), and the last sentence of §5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude

that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover – unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

* * * *

GUIDELINES MANUAL

§ 5K2.0
(Grounds for Departure)

§5K2.0. *Grounds for Departure* (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the Court by identifying some of the factors that the commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under other guidelines. Therefore, if a weapon is a relevant factor to sentencing under one of these other guidelines, the court may depart for this reason.

An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be

relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

Commentary

The last paragraph of this policy statement sets forth the conditions under which an offender characteristic or other circumstance that is not ordinarily relevant to a departure from the applicable guideline range may be relevant to this determination. The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. However, the Commission believes that such cases will be extremely rare.

In the absence of a characteristic or circumstance that distinguishes a case as sufficiently atypical to warrant a sentence different from that called for under the guidelines, a sentence outside the guideline range is not authorized. See 18 U.S.C. § 3553(b). For example, dissatisfaction with the available sentencing range or a preference for a different sentence than that authorized by the guidelines is not an appropriate basis for a sentence outside the applicable guideline range.

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence,

having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence.—The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.— Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the Court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the

court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

EDITORIAL NOTES

Effective Date of 1994 Amendment. Section 80001 (c) of Pub.L. 103-322 provided that "The amendment made by subsection (a) [adding 18 U.S.C. § 3553(f)] shall apply to all sentences imposed on or after [Sept. 23, 1994] the 10th day

beginning after the date of enactment of this Act [Sept 13, 1994]."

Effective Date of 1987 Amendment. Amendment by Pub.L. 100-182 applicable with respect to offenses committed after enactment of Pub.L. 100-182, which was approved Dec. 7, 1987, see section 26 of Pub.L. 100-182.

Effective Date of 1986 Amendment. Section 8(c) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (a) of this section and section 3663 of this title] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 9(b) of Pub.L. 99-646 provided that: "The amendments made by this section [subsec. (b) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Section 80(b) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (d) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [see Effective Date note below]."

Section 81(b) of Pub.L. 99-646 provided that: "The amendments made by this section [amending subsec. (a) of this section] shall take effect on the date of the taking effect of section 212(a)(2) of the Sentencing Reform Act of 1984 [see Effective Date note below]."

Section 1007(b) of Pub.L. 99-570 provided that: "(b) The amendment made by this section [enacting subsec. (d) of this section] shall take effect on the date of the taking effect of section 3553 of title 18, United States Code [this section]."

Effective Date. Section effective on the first day of first calendar month beginning thirty six months after Oct. 12,

1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

Authority to Lower Sentences Below Statutory Minimum for Old Offenses. Section 24 of Pub.L. 100-182 provided that: "Notwithstanding section 235 of the Comprehensive Crime Control Act of 1984 [section 235 of Pub.L. 98-473, set out as a note under section 3551 of this title]—

"(1) section 3553(e) of title 18, United States Code subsec. (e) of this section];

"(2) rule 35(b) of the Federal Rules of Criminal Procedure as amended by section 215(b) of such Act; and

"(3) rule 35(b) as in effect before the taking effect of the initial set of guidelines promulgated by the United States Sentencing Commission pursuant to chapter 58 of title 28, United States Code [sections 991 et seq. of Title 28, Judiciary and Judicial Procedure], shall apply in the case of an offense committed before the taking effect of such guidelines."

Supreme Court, U.S.
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(2)

No. 99 - 15

IN THE

Supreme Court of the United States

October Term, 1998

RONALD H. BLACKLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that, under the facts presented, this prosecution was "related to" the Independent Counsel's original grant of jurisdiction, so as to give the Independent Counsel jurisdiction to prosecute the petitioner.

2. Whether the court of appeals erred in finding harmless under the facts of this case, the trial court's failure to instruct the jury that it had to find a duty to disclose to convict under the concealment prong of 18 U.S.C. § 1001.

3. Whether the court of appeals erred in finding that the district court did not abuse its discretion by departing from the Sentencing Guidelines based upon the facts of this case.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 167 F.3d 543.

JURISDICTION

The court of appeals issued its decision on January 26, 1999, and denied petitioner's timely petition for rehearing on March 31, 1999. The petition for writ of certiorari was filed on June 28, 1999, and was placed on the Court's docket on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Independent Counsel Donald C. Smaltz, representing the United States, is responsible for investigating allegations of unlawful activity by former Secretary of Agriculture

Alphonso Michael Espy.[1] Petitioner, Ronald Blackley, was Espy's Chief of Staff at the United States Department of Agriculture ("USDA") during 1993 and part of 1994. After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted on one count of submitting a false Executive Branch Public Financial Disclosure Form while serving as Espy's Chief of Staff and two counts of making false statements to inspectors general concerning his receipt of over $22,000 from persons having business before the USDA, all in violation of 18 U.S.C. § 1001. He was sentenced to 27 months imprisonment, to be followed by three years supervised release. The court of appeals affirmed his convictions and sentence. Pet. App. 1a-20a.

1. On September 7, 1994, the D.C. Circuit Special Division for the Purpose of Appointing Independent Counsel ("Special Division"), acting upon request of the United States Attorney General, appointed Donald C. Smaltz independent counsel to investigate allegations that then-Secretary of Agriculture Espy had accepted things of value from persons and companies with business pending before the USDA. The order of appointment granted the Independent Counsel

> full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether [Secretary Espy] has committed a violation of any federal criminal law . . . relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

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[1] Independent Counsels appointed pursuant to the Ethics in Government Act have the express statutory authority to initiate and conduct prosecutions "in any court of competent jurisdiction," and that authority includes "handling all aspects of any case, in the name of the United States." 28 U.S.C. § 594(a)(9).

Order Appointing Independent Counsel. Resp. App. 1A-2A. The Special Division also granted the Independent Counsel full authority to:

> [I]nvestigate other allegations or evidence of violations of any federal criminal law . . . by any organization or individual developed during the Independent Counsel's investigation . . . and connected with or arising out of that investigation.
>
> [S]eek indictments and prosecute any organizations or individuals involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters . . . .
>
> [F]ully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel . . . and all matters and individuals whose acts may be related to that subject matter. . . .

Resp. App. 2A.

In April of 1996, the Special Division clarified the scope of this jurisdictional grant by referring to the Independent Counsel as a "related matter"

> the jurisdiction and authority to investigate and prosecute any violation of any federal law. . . related to any application, appeal, or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process.

Resp. App. 4A. In so doing, the Special Division reviewed an extensive factual record, wrote an opinion explaining its reasoning, and concluded that the matter was "demonstrably related to the factual circumstances that gave rise to the Attorney General's initial investigation and request for

appointment of an independent counsel." *In re Espy*, 80 F.3d 501, 509 (D.C. Cir., Spec. Div. 1996).

2. The Independent Counsel subsequently obtained a three count indictment against petitioner charging three violations of 18 U.S.C. § 1001. The indictment alleged that while serving as Chief of Staff under Secretary Espy at the USDA, petitioner received more than $22,000 from individuals regulated by the USDA, and then lied about it on three separate occasions — on his Executive Branch Public Financial Disclosure Form, SF-278, (Count 1), and in two sworn statements to the inspectors general of the USDA and the United States Agency for International Development (Counts 2 and 3). Pet. App. 3a.

During a seven day jury trial, the government presented evidence that, while serving as Chief of Staff under Secretary Espy at the USDA, petitioner received ten checks totaling $21,025 from one individual who was regulated by, and received federal subsidies from, the USDA.[2] The evidence further showed that petitioner received one check in the amount of $1,000 from another individual with business before the USDA shortly after petitioner intervened in the USDA's determination of the amount of subsidies that individual should receive.[3]

Petitioner subsequently concealed his receipt of these funds on three occasions. As a high-level executive branch official, petitioner was statutorily required to submit annually a public financial disclosure form, or SF-278, which obligated petitioner to disclose, *inter alia*, income and gifts received

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[2] *See* Govt. C.A. Br. 9, 39 n.18 (citing 11/19/97 Tr. Vol.2 at 63-68, 73, 100, 105; 11/20/97 Tr. Vol.2 at 189, 196; Govt. Exs. 4, 16, 17, 19, 20, 23, 25, 26, 27, 29, 31, 32(a)-(c), 32(f)).

[3] *See* Govt. C.A. Br. 9-11 (citing 11/19/97 Tr. Vol.2 at 27-87; 11/20/97 Tr. at 27; 11/21/97 Tr. at 8, 28-39, 144-50; Govt. Exs. 3(a), 22, 24, 30).

during that calendar year. Govt. Ex. 34.[4] Petitioner disclosed none of the $22,025 identified above. Govt. Ex. 33. Subsequently, two separate investigations of petitioner were undertaken by offices of inspectors general. During both investigations, petitioner signed sworn statements asserting, in substance, that after he entered government service he received no remuneration of any kind from sources such as the two individuals above. Pet. App. 3a-4a.

At the close of the evidence, the district court charged the jury in full accord with the statutory language of 18 U.S.C. § 1001. The court did not identify as an element of the concealment prong of section 1001 the requirement that the defendant be under an obligation to disclose the information he concealed. The jury convicted petitioner on all three counts.

At sentencing, the district court found that it should sentence petitioner under the fraud guideline, U.S.S.G. § 2F1.1, and after an enhancement for more than minimal planning, U.S.S.G. § 2F1.1(b)(2)(A), arrived at a offense level of eight. It then made an eight-level upward departure, relying on several factors not considered by the guidelines. These factors included: (1) the defendant was a high-level government official when he received monies from individuals with business before the USDA; (2) he had been informed that he was not allowed to receive such payments; and (3) he twice lied under oath about their receipt to investigators who were looking into his conduct. Pet. App. 173a-174a, 184a-186a. The district court sentenced petitioner to 27 months imprisonment.

3. On appeal, petitioner argued *inter alia* that the Independent Counsel lacked jurisdiction to prosecute him because the facts underlying his indictment were not "related

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[4] Title I of the Ethics in Government Act of 1978, as amended (the 'Act'), 5 U.S.C. App. § 101 et seq., requires the reporting of this information. (Govt. Ex. 34).

to" the Independent Counsel's original jurisdictional mandate. The court of appeals rejected petitioner's argument. The court determined that the authority granted to the Independent Counsel by 28 U.S.C. § 593(b)(3) and his original mandate to look into matters "related to" the core areas of the initial inquiry, allowed the Independent Counsel "to pursue crimes by the original target's close associates in the field of activity under investigation, including crimes that either are of the same sort as the originally specified set of crimes or are ancillary to the commission or concealment of such crimes." Pet. App. 9a-10a. The court then determined, based upon petitioner's position, duties, alleged offenses, and the connection of each to the allegations against Espy, that the petitioner's prosecution was "related to" the original mandate. Pet. App. 10a.[5]

With respect to Count 1 only, petitioner also contended before the appeals court that the Independent Counsel violated 28 U.S.C. § 594(f)(1) by failing to follow a provision in the United States Attorneys' Manual that supposedly discourages prosecuting those who submit false financial disclosure forms under 18 U.S.C. § 1001.[6] The court rejected this argument, concluding that the United States Attorneys' Manual does not confer substantive rights on petitioner, just as it does not confer such rights to any individual charged by a United

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[5] This determination was in accord with the Special Division's referral to the Independent Counsel as a "related matter" jurisdiction to investigate and prosecute "any violation of any federal law . . . related to any application, appeal, or request for subsidy made to or considered by the [USDA], for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of Staff Ronald Blackley intervened in the application, approval, or review process." In so doing, the Special Division was "interpreting but not expanding" the Independent Counsel's original prosecutorial jurisdiction. *In re Espy*, 80 F.3d at 507.

[6] The provision in question directs prosecutors "not to prosecute an [Ethics in Government Act] violation under section 1001 unless the nondisclosure conceals significant underlying wrongdoing." Pet. App. 32a. In rejecting Blackley's argument, the district court did not determine that the prosecution, in fact, violated DOJ policy. Pet. App. 36a n.1.

States Attorney's Office. Pet. App. 11a-12a. Section 594(f)(1), the court concluded, is enforced through other means. *Id.* at 12a.

Petitioner next asserted that his conviction must be reversed because the trial court did not instruct the jury that in order to convict under the concealment prong of section 1001, the jury had to first find that he owed a duty to disclose the information he concealed. *Id.* at 15a. The court of appeals noted that some circuits had held that a duty to disclose must be proven under this prong but questioned whether it was an issue for the jury. *Id.* at 16a. The court, however, did not reach this issue. Instead, it concluded that if any error occurred, it was harmless. The court reasoned that, as to the false statement on the Executive Branch Public Financial Disclosure Form (Count 1), it was inconceivable that the jury could have found petitioner guilty without also finding that he had a duty to disclose. *Id.* at 16a-17a. As to the false statements to inspectors general (Counts 2 and 3), the court determined that no rational jury could have found petitioner guilty under the concealment prong of section 1001 without simultaneously finding that he made affirmatively false statements, violating the second prong of section 1001, which was also charged in each count. *Id.* at 17a.

Lastly, petitioner challenged his sentence, arguing that the district court's eight-level departure from the Sentencing Guidelines was improper. The court of appeals rejected petitioner's challenge and affirmed the sentence. The court determined that the district court's departure was based on a mix of factors, including: (1) the defendant was a high-level official when he received monies from individuals regulated by the Agriculture Department; (2) he was informed that he was not allowed to receive such payments; and (3) he twice lied under oath about their receipt. Pet. App. 18a. The court of appeals concluded that the fraud guideline (U.S.S.G. § 2F1.1) did not adequately take these factors into account and the departure was, therefore, within the district court's discretion

allowed under *Koon v. United States*, 518 U.S. 81, 98 (1996). *Id.* at 18a-19a.

ARGUMENT

Petitioner presents no matters meriting review by this court. None of the issues presented by petitioner raise an important federal question or present a circuit conflict, because in each instance the court of appeals correctly identified and applied the controlling law. Petitioner's arguments simply dispute the application of that law to the peculiar facts of his case — claims not worthy of review by this Court. The Petition should therefore be denied.

I. The Jurisdiction Issue Does Not Merit Certiorari Review

Petitioner first urges this Court to review the determination below that the Independent Counsel had jurisdiction to prosecute him. Pet. 10-17. He identifies nothing in the court of appeal's decision meriting certiorari review.

1. Petitioner's jurisdictional challenge is, at its core, simply a request that this Court review the determination that, under the facts of this case, his prosecution was "related" to the Independent Counsel's original mandate. Petitioner does not allege that the original grant of jurisdiction to the Independent Counsel is unconstitutional or otherwise infirm. Rather, he claims only that the facts of the present prosecution do not fit within the boundaries of that jurisdiction. Pet. 11-14. This fact-based challenge does not warrant certiorari review.

Petitioner presented this same jurisdictional challenge to the courts below. In response, the court of appeals identified the appropriate standard from 28 U.S.C. § 593(b)(3), concluding that the present indictment was valid if it "related to" the subject matter with respect to which the Attorney General requested the appointment of the independent counsel. Pet. App. 8a. The court then undertook the requisite

factual inquiry and determined that the underlying facts of petitioner's offense were sufficiently related and fell "squarely within the limits" of the Independent Counsel's jurisdiction. Pet. App. 10a. As the court explained:

> The position description for Blackley as Chief of Staff to Secretary Espy characterized him as the Secretary's "alter ego,"; and he played that role in the very activity — running the Department — in which Espy's alleged offenses were committed. His alleged non-disclosures were of sums received from parties doing business with the Department, thus paralleling the Espy allegations. Furthermore, concealment of such receipts, especially in the context of a financial disclosure form intended to bring suspicious influences to the surface and in response to questions of inspectors general, tends not only to prevent discovery of underlying crimes such as receipts of bribes and gratuities, but also to reflect the perpetrator's consciousness of guilt in those receipts.

Id. Thus, the court concluded that

> the relation between Blackley's § 1001 violations and the core charges set out in the original order is tight enough to meet the "related to" criterion of § 593(b)(3) and the [appointment] order itself.

Id. at 11a.

Petitioner does not contend that the court of appeals applied the wrong standard; indeed, he concedes that the "related to" standard governs resolution of his jurisdiction challenge. *See* Pet. 10-14 (arguing that his indictment does not "relate to" the independent counsel's original mandate). Rather, he simply advances his own view that the facts underlying his prosecution are not sufficiently related to the original jurisdictional mandate, a fact-based proposition rejected by the D.C. Circuit and not meriting certiorari review.

Petitioner suggests that the court of appeals incorrectly applied the "relatedness" test, insisting that "[t]he Circuit Court discusses the meaning of the word 'relation' in the context of the relationship between Espy and Mr. Blackley, as opposed to the crime that is the subject of the mandate." *See* Pet. 11-12. But the D.C. Circuit did not so limit its analysis. The court found a close relationship between not only Espy's and Blackley's positions, but the criminal allegations levied against them as well. Specifically, the court concluded that "[Blackley's] alleged non-disclosures were of sums received from parties doing business with the Department, thus paralleling the Espy allegations." Pet. App. 10a.

Petitioner does not cite any legal authority to support his claim that the circuit employed an erroneous "relatedness" test nor does he identify a circuit split. This issue does not merit certiorari review.

2. Petitioner further asserts that the Independent Counsel violated Department of Justice ("DOJ") policy in contravention of 28 U.S.C. § 594(f)(1). Pet. 14-17. His argument on this point is puzzling because it has little to do with the court of appeals' decision which did not address the merits of this argument, but rather concluded that there is no substantive right to enforce DOJ policies. Pet. App. 11a-13a.[7] Petitioner could hardly suggest that this holding created a circuit conflict as the circuit courts have uniformly held that the DOJ Manual confers no enforceable rights. *See, e.g.*, *United States v. Booth*, 673 F.2d 27, 30 (1st Cir. 1981); *United States v. Schwartz*, 787 F.2d 257, 267 (7th Cir. 1986); *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987); *United States v. Kember*, 648 F.2d 1354, 1370 (D.C. Cir. 1980).

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[7] The court of appeals did not address the trial court's determination that proscribing this Independent Counsel prosecution would be "inconsistent with the purposes of the Independent Counsel statute" and was, therefore, not in violation of section 594(f)(1). Pet. App. 36a n.1, 38a.

Petitioner's argument that "[t]he Circuit's opinion cavalierly dismisses the statutory requirement that an independent counsel follow DOJ policy . . .," Pet. 16, ignores the text of the court of appeals' opinion. That opinion quotes the relevant statutory language (28 U.S.C. § 594(f)(1)), Pet. App. 11a, reviews the statute's purpose and pertinent legislative history, *id.* at 12a, and concludes that the consequences of an independent counsel's failure to follow DOJ policy do not include reversal of a properly obtained conviction. *Id.* at 12a-13a. "Nothing in the . . . Ethics in Government Act suggests that the defendant should be able to escape a sanction otherwise due." *Id.* Petitioner presents no support for a contrary result.

Petitioner presents neither an important federal question nor a circuit conflict. His request for certiorari review should be denied.

II. The "Duty to Disclose" Instruction Issue Does Not Merit Certiorari Review

Petitioner asserts that the court of appeals erred in upholding his convictions where the jury was not specifically instructed that it had to find a duty to disclose before it could convict him under the concealment prong of section 1001. Pet. 17-21. The court of appeals held that, under the facts of this case, the district court's refusal to give petitioner's proposed jury instruction that it had to find a duty to disclose, if error, was harmless. Pet. App. 16a-17a. Petitioner presents no reason for review of this factual determination.

Notably, petitioner devotes almost three pages of his petition (Pet. 17-20) arguing two legal issues not addressed by the court of appeals. Citing numerous circuit decisions, petitioner first argues that, although 18 U.S.C. § 1001 does not explicitly require proof of a duty to disclose, a defendant can only be convicted under the concealment prong of section 1001 if he had a duty to disclose the

information he concealed. *See* Pet. 18.[8] This judicially crafted "duty to disclose" requirement, petitioner's argument continues, is a question of fact that must be placed before the jury. Pet. 19-20, citing *United States v. Gaudin*, 515 U.S. 506 (1995), and *Richardson v. United States*, __U.S. __, 119 S. Ct. 1707 (1999).

But the court of appeals did not reach a contrary decision; indeed, it did not reach either of these legal questions at all. Far from violating this Court's earlier rulings, *see* Pet. 17-18, the court of appeals held simply that even if a duty to disclose is an element of a concealment offense and such an instruction should have been given to the jury, any error was harmless under the facts of this case. 16a-17a. In other words, the court assumed *arguendo* that a duty to disclose instruction should have been given. The court's decision, therefore, in no way conflicts with *Gaudin* or *Richardson*.

Petitioner presents no reason for this Court to review the court of appeals' harmless-error determination. He concedes that the omission of an element from a jury charge is subject to harmless-error analysis, *id.* (citing *Neder v. United States*, __U.S. __ 119 S. Ct. 1827 (1999)) and makes no claim that the court of appeals applied the wrong standard in conducting its harmless-error analysis.[9] Instead, petitioner advances only his

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[8] Citing *United States v. Curan*, 20 F.3d 560, 566 (3d Cir. 1994); *United States v. Zalman*, 870 F.2d 1047, 1055 (6th Cir. 1989); *United States v. Nersesian*, 824 F.2d 1294, 1312 (2d Cir. 1987); *United States v. Murphy*, 809 F.2d 1427, 1431 (9th Cir. 1987); *United States v. Hernando Ospina*, 798 F.2d 1570, 1578 (11th Cir. 1986); *United States v. Larson*, 796 F.2d 244, 246 (8th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676, 683 (1st Cir. 1985); *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir. 1981).

[9] The court of appeals held that "the absence of a jury instruction on an element of the crime is not reversible error where it is inconceivable that the jury could have found the defendant guilty of the crime without making a finding as to the omitted element," Pet. App. 16a, a test recently reaffirmed by this Court. *Neder*, 119 S. Ct. at 1836 (noting that "functional equivalence" test requires reviewing court to determine whether "other facts found by the jury are 'so closely related' to the omitted element 'that

personal dissatisfaction with the court's factual finding, asserting that the court of appeals could not find the error harmless because "the OIC presented no evidence that Mr. Blackley had a duty to disclose any of the checks he received in 1993 on his SF 278 Form." Pet. 21. But this assertion is sharply refuted by the record.

The government presented ample evidence that petitioner was under a duty to disclose the information he concealed on his Executive Branch Public Financial Disclosure Form. Indeed, the SF-278 itself, Govt. Ex. 34A, expressly provides at its outset:

> Title I of the Ethics in Government Act of 1978, as amended (the 'Act'), 5 U.S.C. App. § 101 et seq., requires the reporting of this information. . . . Knowing and willful falsification of information required to be filed by section 102 of the Act may . . . subject you to criminal prosecution and sentencing under 18 U.S.C. §§ 1001 and 3571.

This form excruciatingly details what is and what is not required to be reported. *Id.* Pertinent to the present case, the SF-278 required petitioner to disclose, *inter alia*, non-investment income exceeding $200 from any one source and gift payments aggregating $100 or more in value from any one source. *Id.* at 6, 8-9. In addition, the government presented witness testimony elucidating petitioner's obligation to accurately disclose this information. 11/21/97 Tr. at 76-96.

Petitioner's factual challenge to the court of appeals' harmless error determination does not warrant certiorari review. *See, e.g., Rose v. Clark*, 478 U.S. 570, 584 (1986) (noting that although Court has authority to perform harmless-error review, it "do[es] so sparingly.")

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no rational jury could find those facts without also finding' the omitted element"), quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993).

III. The Sentencing Issue Does Not Merit Certiorari Review

Petitioner's final argument for certiorari, Pet. 21-30, amounts to dissatisfaction with the court of appeals' affirmance of the district court's upward departure in imposing sentence and the discretion permitted district courts under *Koon v. United States*, 518 U.S. 81 (1996). Both the district court and the court of appeals identified and used the correct legal standards, as set out in *Koon*, in setting and affirming the sentence imposed, and petitioner does not demonstrate to the contrary. Petitioner's only challenge, therefore, is that he disagreed with the district court's finding that departure was warranted on the facts presented by this particular case. Because petitioner fails to point out an important federal question of law or a circuit conflict raised by the D.C. Circuit's affirmance of his sentence, he falls woefully short of requiring review of that sentence by this Court.

The weakness of petitioner's argument is plain from one simple observation — his petition does not even address the Circuit's determination that the fraud guidelines "explicitly contemplate upward departures in circumstances that fall outside the main core" of general fraud offenses. Pet. App. 18a, citing U.S.S.G. § 2F1.1, Application Notes 10, 13. Thus, petitioner's reliance on *Koon*'s assertion that "departures *based on grounds not mentioned in the Guidelines* will be highly infrequent," Pet. 22 (emphasis added), is misplaced. Because the fraud guidelines recognize and even encourage departures under certain circumstances, it was well within the district court's broad discretion to depart, *Koon* 518 U.S. at 95, and no review of the affirmance of that decision is necessary. Petitioner cites no authority to the contrary.[10]

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[10] To the extent that petitioner attempts to rely on *Koon*, he badly miscasts the holding of the case as "confirm[ing] the strict limitations imposed on departures," and argues that the court of appeals "ignored the restrictive standards imposed by *Koon*." To the contrary, *Koon* held that

Ignoring this dispositive point, petitioner focuses on the district court's inability to set sentencing policy. Pet. 24-26. Of course, the district court did not purport to set policy; it fixed a sentence in accordance with the facts of the particular case before it. Neither the district court nor the court of appeals asserted that any factor should always be a basis for departure in fraud cases. Under *Koon*, case-by-case sentencing decisions such as in this case are owed great deference because of the district court's experience in dealing with factual circumstances presented in a multitude of various cases. 518 U.S. at 98-99. If petitioner is correct that departing in a particular case somehow improperly invades the Sentencing Commission's authority by setting "policy" for similar cases in the future, then no sentencing court could ever depart. Petitioner's argument therefore entirely misses the point of *Koon* and raises no meritorious issue.

Finally, petitioner contends that the amount of the departure, eight levels, compels review by this Court. He does not explain, however, how such a decision — applying the facts of this particular case to the guidelines to determine an appropriate departure — raises an important federal question or creates a circuit conflict. The district court and court of appeals observed that the analogous provision of U.S.S.G. § 2C1.2 (governing gratuity offenses) provides an eight level increase for offenses involving officials holding "a high-level decision-making or sensitive position." Although petitioner argues against the appropriateness of such an adjustment in light of the Court's decision in *United States v. Sun-Diamond Growers of California*, -- U.S. --, 119 S. Ct. 1402 (1999), he ignores the fact that such an adjustment is also provided by another analogous provision of the Sentencing Guidelines, U.S.S.G. § 2C1.7(b)(1)(B) (adding eight levels for fraud

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district courts enjoy broad discretion in applying the Sentencing Guidelines to the facts of a particular case, including applying departures for facts not adequately considered by the guidelines or for facts expressly warranting departures under the guidelines — precisely as the district court did in the instant case. 518 U.S. at 98-99.

involving deprivation of honest services by public officials). Petitioner also fails to note that the amount of the district court's departure was predicated on more than simply petitioner's receipt of money from individuals regulated by USDA while he held a high-level public office; the district court also cited as reasons for the amount of departure that: (1) petitioner was informed that he was not allowed to receive the payments; and (2) petitioner lied about receipt of the payments twice while under oath. Pet. App. 18a. The district court considered all of these factors in combination when fixing the amount of departure and the court of appeals, applying the applicable law, concluded that such was not an abuse of discretion. These decisions do not implicate important questions of federal law, nor do they create circuit conflicts. Review by this Court is therefore unnecessary.

CONCLUSION

The petition for writ of certiorari presents no circuit conflicts to resolve, and no important questions of federal law that need answering. It should be denied.

Respectfully submitted,

DONALD C. SMALTZ
Independent Counsel
CHARLES M. KAGAY
Chief Appellate Counsel
JOSEPH P. GUICHET
Associate Independent Counsel
WIL FRENTZEN
Associate Independent Counsel

July, 1999

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Alphonso Michael (Mike) Espy Division No. 94-2

Order Appointing
Independent Counsel

Before: SENTELLE, Presiding, and BUTZNER and SNEED, *Senior Circuit Judges.*

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1)(A) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether Alphonso Michael (Mike) Espy, Secretary of Agriculture, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Donald C. Smaltz, Esquire, of the Pennsylvania and California bars, with offices at Smaltz & Anderson, 333 South Grand Ave., Suite 3580, Los Angeles, California 90071, be and is hereby appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Alphonso Michael (Mike) Espy,

Secretary of Agriculture, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, relating in any way to the acceptance of gifts by him from organizations or individuals with business pending before the Department of Agriculture.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any organization or individual developed during the Independent Counsel's investigation referred to above and connected with or arising out of that investigation.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any organizations or individuals involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including organizations or individuals who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter,

inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592(e) and of the ongoing public proceedings and interest in this matter, that it is in the best interests of justice for the identity and prosecutorial jurisdiction of the Independent Counsel to be disclosed.

IT IS SO ORDERED.

Per Curiam
For the Court:

Ron Garvin, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Division for the Purpose of
Appointing Independent Counsels

Ethics in Government Act of 1978, As Amended

In re: Alphonso Michael (Mike) Espy Division No. 94-2

UNDER SEAL

Before: SENTELLE, *Presiding*, and BUTZNER and FAY, *Senior Circuit Judges*

ORDER

Upon consideration of the Application for Referral of a Related Matter, filed under seal on January 25, 1996, the Opposition of the United States to the Application for Referral, and the Reply in Further Support of the Application for Referral, it is

HEREBY ORDERED that investigative and prosecutorial jurisdiction over the following matter be referred to the Independent Counsel Donald C. Smaltz and to the Office of the Independent Counsel as a related matter pursuant to 28 U.S.C. § 594(e):

> The jurisdiction and authority to investigate and prosecute any violation of any federal law, other than a Class B or C misdemeanor, by any organization or individual, related to any application, appeal, or request for subsidy made to or considered by the United States Department of Agriculture, for which Secretary of Agriculture Alphonso Michael (Mike) Espy and/or his Chief of

Staff Ronald Blackley intervened in the application, approval, or review process.

It is

FURTHER ORDERED that the effect of this order be stayed for 10 days to allow the Attorney General to seek review of this order, if she so chooses.

Per Curiam

For the Court:
Mark J. Langer, Clerk

By

Marilyn R. Sargent
Chief Deputy Clerk